80-830

No.

Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE ADVERTISER COMPANY,
Petitioner,

v.

DAVID H. FULTON and WILLIAM B. WYATT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Alabama

STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, AL 36101

M. ROLAND NACHMAN, JR.
P. O. Box 668
Montgomery, AL 36101
(205) 834-2222
Counsel of Record
for Petitioner

WYCHE, BURGESS, FREEMAN
AND PARHAM
P. O. Box 10207
Greenville, S.C. 29603
Of Counsel

DAVID L. FREEMAN
P. O. Box 10207
Greenville, S.C. 29603
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether, consistently with the guarantees of freedom of the press in the First Amendment as embodied in the Fourteenth, a state's highest court may reverse a summary libel judgment in favor of a newspaper and against a public official on the ground that a "glimmer, spark or scintilla of evidence" is sufficient to create a triable issue of fact as to whether the newspaper's publication, if false, was with knowledge of falsity or reckless disregard of whether false or not?

2. Whether, consistently with the constitutional guaranties and in the circumstances described in question 1, a state's highest court may hold that the failure of a newspaper to make an independent investigation as to the truth or falsity of statements made by a state cabinet officer in a news conference, before publishing them, is sufficient to create a triable issue of fact as to whether the newspaper's publication, if false, was with knowledge of falsity or reckless disregard of whether false or not?

3. Whether, consistently with the constitutional guaranties described in question 1, in a defamation action brought against a newspaper, a state's highest court must determine whether the plaintiff is a public official or public figure within the federal rule of libel and as defined in a uniform manner consistent with the constitutional protection of free speech and press guaranteed by the federal rule enunciated in *New York Times* v. *Sullivan,* 376 U.S. 254?

---

[1] The parties to the proceedings in the Supreme Court of Alabama were: David H. Fulton and William B. Wyatt, Appellants there and Respondents here; and Petitioner, The Advertiser Company and David G. Bronner, Appellees there.

4. Whether, consistently with the constitutional guaranties and in the circumstances described in question 1, summary judgment in favor of a newspaper is essential to safeguard freedom of the press from the chilling effect of a spurious libel suit—supportable, if at all, by a flicker, gleam or scintilla of evidence?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Invoked	2
Statement of the Case	2
Reasons for Granting the Writ	7
I. The Application of Alabama's Scintilla Rule in This Case Violates Freedom of the Press	8
II. The Requirement That a Newspaper Make an Independent Investigation Before Reporting Statements of a State Cabinet Officer in a News Conference Violates Freedom of the Press	12
III. A Judicial Failure to Determine Whether a Libel Plaintiff is a Public Official or Public Figure Under a Uniform Constitutional Test Violates Freedom of the Press	13
IV. Freedom of the Press Mandates Summary Judgment	16
Conclusion	17
APPENDIX A (Opinion of Supreme Court of Alabama)	A-1
APPENDIX B (Opinion and Judgment of Trial Court)	A-14
APPENDIX C (Exerpts from Affidavit of David G. Bronner)	A-22

TABLE OF AUTHORITIES

Cases

American Benefit Life Ins. Co. v. McIntyre, (Ala.) 375 So.2d 239 8

Beckley v. Hanks, 389 U.S. 81 4,14

Bienvenu v. Angelle, 254 La. 182, 223 So.2d 140 15

Bishop v. Wometco Enterprises Inc., 235 So.2d 759 15

Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970) 16

Brady v. Southern Ry. Co., 320 U.S. 476 9

Brown v. Kitterman, 443 S.W.2d 146 15

Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972) cert. denied, 409 U.S. 1125 16

Chase v. Daily Record, Inc., 83 Wash.2d 37, 515 P.2d 154 15

Cherry v. Hall, 270 So.2d 626 15

Coursey v. Greater Niles Tp. Publishing Corp., 40 Ill.2d 257, 239 N.E.2d 837 15

Doctors Convalescent Center, Inc. v. East Shore Newspapers, Inc., 104 Ill. App.2d 271, 244 N.E.2d 373 . 15

Fadell v. Minneapolis Star & Tribune Co., 557 F.2d 107 (7th Cir. 1957) cert. denied 434 U.S. 966 16

Gertz v. Robert Welch, 418 U.S. 323 4,13

Guitar v. Westinghouse Electric Corp., 396 F. Supp. 1042 (S.D.N.Y. 1975) 16

Hanson v. Couch, (Ala.) 360 So.2d 942 9

L. & N. R. Co. v. Grizzard, 238 Ala. 49, 189 So. 203 ... 10

L. & N. R. Co. v. Steel, 257 Ala. 474, 59 So.2d 664..... 10

L. & N. R. Co. v. Green, 255 Ala. 642, 53 So.2d 358 ... 10

MacNeil v. Columbia Broadcasting System, Inc., 66 FRD 22 15

Meerpol v. Nizer, 381 F.Supp. 29, (S.D.N.Y. 1974) 16

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 3

Miller v. News Syndicate Co., 445 F.2d 356 (2d Cir. 1971) 16

Mobile Press Register v. Faulkner, (Ala.) 372 So.2d 1282..... 3,4

Monitor Patriot Co. v. Roy, 401 U.S. 265 12

New York Times v. Sullivan, 376 U.S. 254 (1964). 3,4,7,8,10,12, 13,14,15,16

Ocala Star-Banner Co. v. Damron, 401 U.S. 295 12

Perry v. Columbia Broadcasting System, Inc., 499 F.2d 797 (7th Cir.) cert. denied, 419 U.S. 883..... 16

Rosenblatt v. Baer, 383 U.S. 75 4,7,14

Ross v. News Journal Co., 228 A.2d 531 15

Ryan v. Dionne, 28 Conn. Sup. 35, 248 A.2d 583 15

St. Amant v. Thompson, 390 U.S. 727 8,13,15

Standke v. B. E. Darby & Sons, Inc., 193 N.W.2d 139 .. 15

Silbowitz v. Lepper, 32 App. Div2d 520, 299 N.Y.S.2d 564..... 15

Tagawa v. Maui Publishing Co., 448 P.2d 337 15

Thompson v. Evening Star Newspaper Co., 129 U.S. App. D.C. 299, 394 F.2d 774 cert. denied, 393 U.S. 884 16

Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), cert. denied 395 U.S. 992 16

Time, Inc. v. Pape, 401 U.S. 279 3,11,15

Tunnell v. Edwardsville Intelligence, Inc., 99 Ill. App. 2d 1, 241 N.E.2d 28 15

Vintage Enterprises, Inc. v. Cash, (Ala.) 348 So.2d 476 . 9

Washington Post Co. v. Keogh, 365 F.2d 965 (1966), cert. denied 385 U.S. 1011 16

Statutes

45 U.S.C.A. §51 et seq. 9

§6-8-104, Ala. Code 1975 9

Miscellaneous

Restatement of the Law, Torts 2nd, p. 152 10

Restatement of the Law, Torts 2nd, 580A(f), p. 220 11

IX Wigmore on Evidence, §2492 9

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE ADVERTISER COMPANY,
Petitioner,

v.

DAVID H. FULTON and WILLIAM B. WYATT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Alabama

OPINIONS BELOW

The opinion of The Supreme Court of Alabama is reported at 14 Alabama Bar Reporter 2651 and appears as Appendix A hereto; the opinion of the trial court, the Circuit Court of Montgomery County, Alabama of October 30, 1979, appears as Appendix B hereto.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on September 19, 1980. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The judgment of the Supreme Court of Alabama in these consolidated defamation actions reversed a summary judgment of the Circuit Court of Montgomery County ("trial court") in favor of petitioner, a newspaper publisher ("Advertiser") and a co-defendant, one David G. Bronner, then Finance Director of the State of Alabama.[1] Respondent Wyatt, recently discharged deputy director of the State Building Commission of Alabama ("Commission"), had brought a libel action against Advertiser seeking compensatory damages of $100,000 and punitive damages of $1,500,000; and respondent Fulton, a recently

---

[1]A separate petition for certiorari is being filed contemporaneously by Bronner.

discharged building inspector of the Commission, had brought one seeking compensatory damages of $200,000 and punitive damages of $2,000,000. The claims for libel, as will more fully appear, arose out of Advertiser's press coverage of a news conference held by Bronner on May 29, 1979.[2] Although the summary judgment of the trial court was based upon Bronner's defense of qualified executive privilege, which the trial court held "cloaked Advertiser as well since it was merely printing the news as it found it," among the other "numerous" defenses asserted by Advertiser in its pretrial motions was that a summary judgment was essential to avoid the abridgment of Advertiser's freedom of the press guaranteed by the First and Fourteenth Amendments. Moreover, in the court below, Advertiser again asserted in its brief that the summary judgment entered by the trial court was essential to avoid the abridgment of that freedom, and that the judgment in its favor was mandated by *New York Times* v. *Sullivan,* 376 U.S. 254, and its progeny.[3] The Supreme Court of Alabama rejected this constitutional assertion; reversed the summary judgment for Advertiser; and remanded for trial what it deemed to be a genuine issue of material fact. This case is ripe for review here. See *Time, Inc.* v. *Pape,* 401 U.S. 279, 283-284, (where this Court reversed a judgment of the Court of Appeals which had reversed the district court's grant of a directed verdict for the magazine); and *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 246-247.

---

[2]Respondent Wyatt sought compensatory damages against Bronner of $100,000 and punitive damages of $1,000,000; and respondent Fulton sought compensatory damages of $200,000 and punitive damages of $2,000,000 against him.

[3]Advertiser's brief in the court below contained the following:

> "Although the trial court found it unnecessary to reach the point, Bronner and Advertiser strongly urge here, as there, that the current law of libel in Alabama, *Mobile Press Register* v. *Faulkner,* (Ala.) 372 S.2d 1282, as mandated by *New York Times* v. *Sullivan,* 376 U.S. 254 and its progeny, constitutionally required the summary judgment below. Even if the statements

The nature of the alleged libel by Advertiser and of the "genuine issue" for trial involved the following circumstances. Bronner, newly appointed Finance Director on March 14, 1979, became by virtue of that appointment a member of the Alabama Building Commission and chairman of a special committee charged with supervising the personnel and financial affairs of the technical staff of the Commission.[4]

Because of widespread complaints regarding long standing mismanagement, one of Bronner's earliest undertakings was an investigation designed to evaluate these reports and the performance of the Commission and its technical staff and personnel. Bronner, jointly with other public investigators, conducted an extensive investigation into the activities and affairs of the Commission, its director of technical staff, its deputy director

---

made by Bronner and reprinted in Advertiser had been false, they are not actionable unless Bronner and Advertiser knew they were false or made them with reckless disregard of whether they were false or not.

"The *Sullivan* doctrine applies because Wyatt and Fulton were public officials; and because, even if they were not, they seek punitive damages. *Gertz* v. *Robert Welch,* 418 U.S. 323; *Mobile Press Register* v. *Faulkner, supra* at 1284.

"The determination of whether a libel or slander plaintiff is a public official or public figure is a question for the court. *Mobile Press Register* v. *Faulkner, supra* at 1284. Wyatt as deputy director of the State Building Commission is surely a public official within the test of the leading case, *Rosenblatt* v. *Baer,* 383 U.S. 75; and building inspector Fulton is as much a public official as the manager of a county ski lodge in *Rosenblatt.* In *Beckley* v. *Hanks,* 389 U.S. 81 the clerk of a state court was held to be a "public official" under the *New York Times* rule. Many state and federal decisions accord."

[4]The technical staff of the Commission reviewed all architectural and construction agreements, architects statements, contractors estimates, material statements and change orders relating to buildings and capital improvements of the State of Alabama.

(respondent Wyatt) and its employees. The investigation including oral examinations under oath.

Bronner's extensive, and uncontroverted affidavit (Appendix C to this Petition) details the relevant results of this investigation. After it had been concluded, the Commission discharged the Director of Technical Staff, one Hugh Adams; its deputy director, respondent Wyatt; three building inspectors, respondent, Fulton, Allen and Martin; and one other employee. Thereafter, Adams and Martin filed slander actions against Bronner; and Wyatt and Fulton filed these actions. Subsequently, Adams pleaded guilty to a criminal indictment for perjurious grand jury testimony that "he never received any monetary payments in the building industry;" and he dismissed his action. Martin did not appeal from a summary judgment in favor of Bronner.

As recited in the opinion of the court below, on May 29, 1979, Bronner conducted a press conference which was covered by Advertiser. Its news story, which is the basis of respondents' libel actions, is quoted in pertinent part in the opinion below, as is Bronner's written press release. Although the written press release and the oral portions of the news conference concerned directly the stated results of Bronner's investigation into the activities and management of the Commission, including a thorough review of the qualifications and past performance of the Commission personnel; and although the Advertiser news story quoted extensively from the written press release, and obviously dealt, even if not exclusively, with the qualifications and past performance of the discharged personnel, the Supreme Court of Alabama, nevertheless, found a genuine issue for trial of these multimillion dollar defamation actions solely because the precise words "qualifications and performance" did not appear in the news article. (Ms. 17) Moreover, that court below imposed upon Advertiser the duty of making an "independent investigation as to the truth or falsity of Bronner's statements." (*Ibid.*)

Advertiser, without dispute, accurately reported a news conference of a highly placed state cabinet official, Bronner, concerning the results of a thorough investigation which had disclosed prior mismanagement and more in an important state agency.

Respondent, Wyatt—the deputy director with significant supervisory duties over the state agency during the period involved and the subject as well of sworn testimony of misconduct—and respondent, Fulton—whose performance as one of too many building inspectors was subpar—were unable to meet the extensive Bronner affidavit (Appendix C) or even those portions specifically directed to them. Instead, their affidavits recited that they were not guilty of any of the accusations made against them and that they had performed their duties in a good and professional manner and had never been subjected to discipline or criticism. And their affidavits contained irrelevant assertions that they had committed no crimes; had never received any kickbacks or illegal payments; that they had never been subjected to prior criticism and had no reason to believe that there was dissatisfaction with their performances; that they had not been informed that an investigation was being directed at them; and that they knew of no persons on the Commission who were taking bribes or kickbacks or illegal payments.

REASONS FOR GRANTING THE WRIT

More than 16 years ago, because Alabama's libel laws abridged freedom of the press, this Court cast aside this impermissible infringement and adopted a new "federal rule" of libel. *New York Times* v. *Sullivan,* 376 U.S. 254, 279-280:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Because Alabama has applied its so-called "scintilla rule" to libel actions brought by public officials or public figures against newspapers in these circumstances; because, moreover, Alabama imposes a requirement that a newspaper make an independent investigation of the statements which it has reported about such public officials, even, as in the case at bar, reports of statements made in a public news conference by a highly placed cabinet official; because the Alabama Supreme Court has refused to make a determination of who is a public official or a public figure as required by a concomitant uniform constitutional standard;[5] and because, in so doing, the court below has decided these critical federal questions in a way which conflicts with *New York Times* v. *Sullivan* and all of its progeny to date, it is imperative that this Court address and overturn the renewed rejection by the Supreme Court of Alabama of the constitutional guaranties enshrined in these decisions of this Court as essential to freedom of the press.

---

[5] *Rosenblatt* v. *Baer,* 383 U.S. 75, 84 *et seq.*

I.

The Application Of Alabama's Scintilla Rule In This Case Violates Freedom Of The Press.

This Court in *New York Times* v. *Sullivan,* 376 U.S. at 285-286, held that proof of malice under the federal rule of libel must be with "the convincing clarity which the constitutional standard demands. . ." Moreover, "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson,* 390 U.S. 727, 731.

The court below, however, has reversed a summary judgment for this newspaper presumably on the theory that absence of the words "qualifications and performance" from a news article otherwise containing an altogether accurate reporting of a news conference held by a highly placed state official, meets the burden of proof by convincing clarity that this newspaper in fact entertained serious doubts as to the truth of its publication. Such an absurdity can perhaps be explained—if at all—by the application of Alabama's "scintilla rule" to this libel case. (Opinion Below, Ms. 12-14) As the court below recently explained in another libel case, *American Benefit Life Ins. Co.* v. *McIntyre,* 375 So.2d 239, 246 (Ala. 1979):

> We hold from the materials before it that the trial court at the very least should have gleaned a glimmer, spark or scintilla of evidence which would present a triable issue of fact over whether the statements were published with knowledge of their falsity or with reckless disregard of whether they were false or not.

And the court below there went on to hold that *New York Times* v. *Sullivan* does not "require the application of a clear and convincing evidence test on a motion for summary judgment when the plaintiff is a public figure." (375 So.2d at 249)

The pervasiveness of the Alabama scintilla rule does not end at summary judgment. Its gleam and glimmer provide "the standard by which the trial judge must determine the propriety of granting a motion for directed verdict;"[6] and, if a jury returns a verdict for a plaintiff on such a scintilla of evidence, a judgment notwithstanding the verdict "should be denied if there is any conflict in the evidence for the jury to resolve and the existence of such conflict is to be determined by the scintilla rule."[7] Only a new trial may be granted in these circumstances; and, under a recently reenacted Alabama statute:

> "No more than two trials can be granted the same party in any cause of action."[8]

There is no way that Alabama's scintilla rule—the underpinning of the judgment below which reversed a summary judgment for this newspaper—can meet the constitutional requirement of this Court that malice under the federal constitutional law of libel must be proven by convincing clarity. "Convincing clarity" and a "gleam or glimmer" of evidence are simply contradicitions in terms.

In *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, this Court rejected North Carolina's scintilla of evidence rule in actions brought under the Federal Employers' Liability Act.[9] It held that a "uniform federal rule as to the necessary amount of evidence" was essential if litigants under the Act were to receive similar treatment throughout the country:

---

[6] *Vintage Enterprises Inc.* v. *Cash,* 348 So.2d 476, 478 (Ala. 1977).

[7] *Hanson* v. *Couch,* 360 So.2d 942, 944 (Ala. 1978).

[8] §6-8-104, Alabama Code 1975. Apparently Alabama and South Carolina are the only states which have retained the scintilla rule. IX Wigmore on Evidence, § 2492.

[9] 45 U.S.C.A. §51 *et seq.*

> [W]hen a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. (Cit.) When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. (320 U.S. at 479-80)[10]

A fortiori Alabama's scintilla rule must bow to the constitutional requirement which impelled the federal rule of libel enunciated in *New York Times* v. *Sullivan,* and the accompanying constitutional test for meeting the constitutional standard demanded by this constitutional rule.

The American Law Institute and the authors of the Restatement of the Law, Torts 2nd waited more than ten years after *New York Times* v. *Sullivan* to restate the law of defamation. Their reason was:[11]

---

[10] The Alabama Supreme Court has bowed without difficulty to the elimination of its scintilla rule in suits under the federal act. *L. & N. R. Co.* v. *Grizzard,* 238 Ala. 49, 54-55, 189 So. 203; *L. & N. R. Co.* v. *Steel,* 257 Ala. 474, 478-479, 59 So.2d 664; *L. & N. R. Co.* v. *Green,* 255 Ala. 642, 646-647, 53 So.2d 358.

[11] Restatement of the Law, Torts 2nd, p. 152.

> The institute does not refrain from the process of restating an area of the law because of the circumstance that it is in the process of undergoing substantial change. Instead, it has sought to anticipate the further development of the decisions and to analyze the logical implications of the newly developed principle. In the situation here involved, however, there is a material difference. Here, *one court, the Supreme Court of the United States, has the final word, and its decision is binding on all of the state courts as a matter of constitutional law.* A section of the Restatement that does not accord with an existing or later decision of the Supreme Court is simply wrong, and no amount of authority from other courts can make it accurate. For this reason, the Institute has deferred as long as feasible the restatement of the chapters on defamation, in the hope that new decisions of the Supreme Court would settle uncertain issues. In the decade since the New York Times case, the Court was struggling to determine and set forth the evolving constitutional law on the subject. (Emphasis supplied.)

On the question of the weight of the evidence, the uniform law of the land is:[13]

> Not only does the plaintiff have the burden of raising the issue of knowledge or reckless disregard and of proving that the defendant's conduct was outside the scope of the constitutional protection, but *the proof must be 'with convincing clarity.' This requirement, also described as one of 'clear and convincing proof,' is held to be imposed by the Constitution.* (Emphasis supplied.)

The decision below conflicts with *Time, Inc.* v. *Pape,* 401 U.S. 279. There this Court determined that evidence of the

---

[13] Restatement of Torts 2nd, 580A(f), p. 220.

omission of the word "alleged" from a magazine story based upon a government report was insufficient, as a matter of law, to support a finding of knowing or reckless falsity.[14]

The decision below conflicts as well with other decisions of this Court. *Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295, 300, reversed a libel judgment based upon a false news story that a candidate for tax assessor had been charged in a federal court with perjury, when in fact the candidate's brother was the one who had been so charged:

> Since the [plaintiff] was permitted to recover without a finding that the newspaper either knew the article was false or published it in reckless disregard of its truth or falsity, the judgment must be reversed unless there is some basis for saying that the rule of New York Times does not apply to the particular libel in question.

In *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272—reversing on the same day another libel judgment against a newpaper—this Court reiterated "the stringent standard of knowing falsehood or reckless disregard of the truth . . ."

II.

The Requirement That A Newspaper Make An Independent Investigation Before Reporting Statements Of A State Cabinet Officer In A News Conference Violates Freedom of the Press.

The decision of the Alabama Supreme Court conflicts with *New York Times* v. *Sullivan* and its progeny in its requirement that Advertiser make an "independent investigation as to

---

[14] This Court reversed a judgment of the Court of Appeals which had reversed the district court's grant of a directed verdict for the magazine. 401 U.S. at 283-284.

the truth or falsity" of Bronner's statements. (Ms. 17) For *New York Times* v. *Sullivan,* 376 U.S. at 287-288, held that a newspaper's failure to check the accuracy of an advertisement against news stories in its own files did not establish reckless disregard for the truth.[15]

Moreover, this Court in *St. Amant* v. *Thompson,* 390 U.S. 727, 731, reversed a state libel judgment because of a finding of malice based upon a failure to investigate. It adopted, instead, a constitutional test which equates reckless disregard for truth with subjective awareness of probable falsity, namely, "serious doubts [by defendant] as to the truth of his publication." In short, unless there is a "high degree of awareness of probable falsity," there can be no finding of malice, in the constitutionally required sense, arising out of a failure to investigate before publishing. (Ibid.)

III.

A Judicial Failure To Determine Whether A Libel Plaintiff Is A Public Official Or Public Figure Under A Uniform Constitutional Test Violates Freedom Of The Press.

Although the court below held that a judicial determination of whether the plaintiffs were public officials or public figures is "mandatory", it declined to make this determination, and held instead "that the trial court erred in failing to make this initial determination." (Ms. 12) The court below has thus decided a federal question in a way in conflict with applicable decisions of this Court. The doctrine of *New York Times* v. *Sullivan,* 376 U.S. 254, applies because respondents Wyatt and Fulton were public officials; and, indeed, even if they were not, because they seek $3,500,000 in punitive damages from Advertiser. *Gertz* v. *Welch,* 418 U.S. 323, 350:

---

[15] See this Court's analysis in *Gertz* v. *Welch,* 418 U.S. 323, 334, n. 6.

> In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

This Court held in *Rosenblatt* v. *Baer,* 383 U.S. 75, 84, that the question of whether a defamation plaintiff is a public official within the federal rule of *New York Times* v. *Sullivan* should not be answered by reference to state-law standards; that the constitutional protections afforded by *New York Times* may not vary from state to state; and that, accordingly, "public officials" must be defined in a uniform manner consistent with the constitutional protection of free speech and press guaranteed by the federal rule enunciated in *New York Times.* Surely such a critical constitutional determination may not be ignored by a state's highest court in a multimillion dollar defamation action. And this Court in *New York Times* v. *Sullivan,* 376 U.S. at 284-285, has made it plain that:

> [C]onsiderations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.

Indeed, this Court has held that the manager of a ski lodge,[16] the clerk of a state court,[17] a police commissioner,[18] a deputy

---

[16] *Rosenblatt* v. *Baer,* 383 U.S. 75.

[17] *Beckley Newspapers* v. *Hanks,* 389 U.S. 81.

[18] *New York Times* v. *Sullivan,* 376 U.S. 254.

sheriff,[19] and a deputy chief of detectives[20] are "public officials" within the holding of *New York Times.*

Wyatt, as deputy director of the State Building Commission and building inspector Fulton are public officials within the tests of the decisions of this Court. Many state and federal decisions accord.[21]

---

[19] *St. Amant* v. *Thompson,* 390 U.S. 727.

[20] *Time, Inc.* v. *Pape,* 401 U.S. 279, 284.

[21] In the following cases the following plaintiffs were held to be "public officials" within the New York Times rule: *Ross* v. *News Journal Co.,* 228 A.2d 531, (justice of the peace and his clerk); *MacNeil* v. *Columbia Broadcasting System, Inc.,* 66 FRD 22 (Marine Corps officer participating in national security seminar in his official capacity as spokesman for the Defense Department); *Ryan* v. *Dionne,* 28 Conn. Supp. 35, 248 A.2d 583 (city's delinquent tax collector); *Bishop* v. *Wometco Enterprises Inc.,* 235 So.2d 759 (investigator who was paid professional employee of city); *Tagawa* v. *Maui Publishing Co.,* 448 P.2d 337 (member of county board of supervisors); *Coursey* v. *Greater Niles Tp. Publishing Corp.,* 40 Ill.2d 257, 239 N.E.2d 837 (city patrolman); *Tunnell* v. *Edwardsville Intelligence, Inc.,* 99 Ill. App.2d 1, 241 N.E.2d 28 (city attorney); *Doctors Convalescent Center, Inc.* v. *East Shore Newspapers, Inc.,* 104 Ill. App.2d 271, 244 N.E.2d 373 (nursing home licensed by state department of health, but neither state-owned nor state-operated); *Bienvenue* v. *Angelle,* 254 La. 182, 223 So.2d 140 (parish director of public welfare); *Cherry* v. *Hall,* 270 So.2d 626 (parish treasurer elected by police jury of parish); *Standke* v. *B. E. Darby & Sons, Inc.,* 193 N.W.2d 139 (grand jurors); *Brown* v. *Kitterman,* 443 S.W.2d 146 (manager of community center); *Silbowitz* v. *Lepper,* 32 App. Div2d 520, 299 N.Y.S.2d 564 (supervisor and senior administrator of post office branch of New York City Post Office Department); *Chase* v. *Daily Record, Inc.,* 83 Wash.2d 37, 515 P.2d 154 (port district commissioner).

IV.

Freedom Of The Press Mandates Summary Judgment.

The judgment below mocks the First Amendment guarantees of free press and free speech and emasculates *New York Times* v. *Sullivan* and other landmark decisions of this Court. It demonstrates starkly why many courts have held that summary judgments in favor of newspapers are essential to safeguard freedom of the press from the chilling effect of spurious libel suits—those supportable, if at all, by flickers, gleams or scintillas of evidence.[22]

This case presents classic evil. Because Bronner did his duty and investigated reports of prior mismanagement and worse in an important state agency—and then acted on the basis of sworn testimony—he was immediately subjected to multimillion dollar slander suits by four agency employees who were discharged. One of the four—the former director of the agency—has pleaded guilty to a criminal charge arising out of payments from contractors, and has withdrawn his civil slander action. Another, discharged for using a state automobile to engage in political activities on state time while on the state payroll, has not appealed from the summary dismissal of his

---

[22] *Fadell* v. *Minneapolis Star & Tribune Co.*, 557 F.2d 107 (7th Cir. 1957), cert. denied 434 U.S. 966; *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Time, Inc.* v. *McLaney*, 406 F.2d 565 (5th Cir.), cert. denied, 395 U.S. 992; *Perry* v. *Columbia Broadcasting System, Inc.*, 499 F.2d 797 (7th Cir.), cert. denied, 419 U.S. 883; *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125; *Miller* v. *News Syndicate Co.*, 445 F.2d 356 (2d Cir. 1971); *Thompson* v. *Evening Star Newspaper Co.*, 129 U.S. App. D.C. 299, 394 F.2d 774, cert. denied, 393 U.S. 884; *Washington Post Co.* v. *Keogh*, 125 U.S. App. D.C. 32, 365 F.2d 965 (1966), cert. denied, 385 U.S. 1011; *Meerpol* v. *Nizer*, 381 F.Supp. 29, 32 (S.D.N.Y. 1974); *Guitar* v. *Westinghouse Electric Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975).

case. But the court below has permitted respondent Wyatt—deputy director with significant supervisory duties over the agency during the period involved and the subject as well of sworn testimony of misconduct, and respondent Fulton—whose sub par performance as one of too many building inspectors has already been described, to continue this baseless litigation through indeterminate and costly state trial and appellate proceedings.

Summary judgments in favor of newspapers which publish the result of such investigations into maladministration are constitutionally required in order to relieve against the financial burdens of expensive court proceedings, which, if unwarranted, would offend the constitution by "chilling" the exercise of free speech and press, and thus foreclosing this vital avenue of communication to the public.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

M. ROLAND NACHMAN, JR.
P. O. Box 668
Montgomery, Alabama 36101
Counsel of Record for Petitioner

DAVID L. FREEMAN
P. O. Box 10207
Greenville, South Carolina 29603
Counsel for Petitioner

APPENDIX

APPENDIX A

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1980

No. 79-217

David H. Fulton, et al.

v.

The Advertiser Company, et al.

Appeal from Montgomery Circuit Court

PER CURIAM.

This is an appeal from a summary judgment for defendants The Advertiser Company and David Bronner in a defamation suit seeking compensatory and punitive damages. We reverse and remand.

Defendant David Bronner, Finance Director of the State of Alabama and by virtue of that position a member of the State of Alabama Building Commission, acting within his official capacity as Chairman of the State Building Commission's Executive Committee on Personnel and Finance, initiated an investigation into alleged abuses and misconduct within the Commission. As a result of this investigation and the Committee's examination of the Commission, six Commission employees, including plaintiffs William Wyatt, the Deputy Director of Technical Staff, and David Fulton, a building inspector, were fired.

With regard to these dismissals, defendant Bronner held a press conference May 29, 1979, during which he issued a press release, made some additional statements, and answered ques-

tions from members of the assembled press, which included a representative of defendant Advertiser. The same day both plaintiffs were notified of their dismissal by letters from the Committee. On May 30, the Advertiser published an article in its morning edition concerning the investigation and the dismissals.

As a result of the press release, additional statements made at the press conference, and the subsequent newspaper article, Wyatt, Fulton and others not involved in this appeal filed separate complaints seeking compensatory and punitive damages for libel and slander against Bronner and the Advertiser. Bronner and the Advertiser moved to dismiss on a number of grounds. Certain of these grounds were denied and a hearing was set on the remaining grounds. Affidavits were filed by both sides and after arguments the trial court granted summary judgments for both defendants. That court held that Bronner's statements were qualifiedly privileged and that there was no evidence in the record indicating actual malice. Accordingly, the court found that the Advertiser's report of the press conference was fair and that Bronner's privilege also protected the newspaper. Wyatt and Fulton appeal.

The basic issue presented by this case is whether summary judgment was appropriate. Prior to any resolution of this issue, however, an examination of the alleged defamatory statements is necessary.

The press release issued by Bronner stated the following:

> A financial investigation authorized by Title 41 of the Code of Alabama has been conducted into the Alabama Building Commission.
>
> The investigation was conducted by the Examiners of Public Account, the Department of Public Safety and the Finance Office, which included taking sworn deposition from employees of the Building Commission, architects, contractors and testing firms from throughout Alabama.

As a result of this financial investigation, evidence of questionable activities and management was received relating to the following:

(1) The utilization of state employees on state time to do private business.

(2) The discovery of employees on the payroll who provided little or no service to the state.

(3) Allowing and/or initiating construction change orders resulting in contractors receiving greater profits.

(4) The utilization of gratuities and/or agents in order to secure state business.

Based on the information produced by the financial investigation and a thorough review of the qualifications and past performance of the present Building Commission personnel, the "Personnel and Finance Committee" of the Building Commission discharged six employees.

All results of the investigation will be turned over to the Attorney General to be utilized as he sees fit.

In his affidavit, Bronner stated the following concerning his comments at the press conference:

In response to a question, I gave the names of the six employees referenced in the statement - names which included plaintiffs Wyatt and Fulton... .

At no time did I state that any charges had been or would be lodged against them. In fact, when asked by a reporter what charges had been made against any specific individuals, I answered, "What charges? I have made no charges about anyone. As far as the Committee is concerned, they were dismissed because of qualifications and performance."

The article published by the Advertiser in response to the press conference reads, in pertinent part, as follows:

> The director, deputy director and four other employees of the State Building Commission were fired Tuesday in the wake of an investigation into mishandling of building contracts and state work on private property.
>
> Finance Director David Bronner said Building Commission Director Hugh Adams, Deputy Director William Wyatt, Energy Division chief John Cluck and three building inspectors were fired by the commission's executive committee after the investigation uncovered widespread abuses in the department.
>
> Bronner directed the six-week investigation by members of the Examiners of Public Accounts, the Department of Public Safety, and the Finance Department.
>
> The results were turned over to Attorney General Charlie Graddick for further investigation.
>
> W.G. Stevenson, a professional engineer and veteran employee of the commission, was appointed temporary director of the department. Other vacancies will be filled later, but Bronner said some of the vacancies will probably remain unfilled.
>
> The finance director said one of the fired building inspectors had not turned in an inspection report in seven years.
>
> The dismissed inspectors were identified as David Fulton, Ray Martin and Howard Wilson.
>
> Bronner said the investigation uncovered evidence of questionable activities and management in four areas:
>
> —The use of state employees on state time to do private business.

—The discovery of employees on the payroll who provided little or no service to the state.

—Allowing or initiating construction change orders resulting in contractors receiving greater profits.

—The use of gratuities and agents in order to secure state business.

Contractors and architects wanting to do business with the state were told they would have to get an agent with political influence before they could get a state contract, Bronner said. The contractor or architect negotiated with the agent to use his influence, the finance director added.

But the contractors and architects who used agents in the past would not be barred from doing business with the state, he said.

"This is more a problem of the state than of the architects and contractors," he said. "They had to go through the system, and the system was bad."

Bronner said in reply to questions that none of the private work involved the new home of former Gov. George Wallace or property of his relatives.

The finance director declined to answer when asked if the private work involved property belonging to any of the dismissed employees.

Change orders were freely given with the result that contractors could bid low on a project and then add unbid modifications to increase the price to a more profitable level, he said.

The investigators examined commission activities over a five- or six-year period during which contracts involving millions of dollars in school and other building construction were issued.

> ... Wyatt was appointed to the commission staff as deputy director in 1971.
>
> ... Bronner said the dismissed employees were not given a chance to resign because they knew for at least two weeks they were being investigated and had not resigned.

This article was accompanied by a headline in bold type which stated: "Officials Fired Following Probe."

The letters of dismissal to both plaintiffs simply informed them that the Committee had met "to review qualifications and performance of Commission employees" and that their (plaintiffs') employment had been thereby terminated.

In an action for defamation, an initial determination of the status of the allegedly defamed person as a public official, public figure, or a private individual *must* be made. *E.g., American Benefit Life Ins. Co.* v. *McIntyre,* 375 So. 2d 239 (Ala. 1979). This is a question of law for the trial judge. *Rosenblatt* v. *Baer,* 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed. 2d 597 (1966), *Mobile Press Register, Inc.* v. *Faulkner,* 372 So. 2d 1282 (Ala. 1979).

In *Mobile Press Register, Inc., supra,* this Court stated:

> This issue [status] must be resolved first because the manner of its resolution determines what elements of proof are necessary for recovery. *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed. 2d 686 (1964), and its progeny mandate that no public figure may recover compensatory or punitive damages for libel unless actual malice as defined in *Sullivan* is proved: a publication made with actual knowledge of its falsity or made with reckless disregard of its truth or falsity. If plaintiff be a private figure, he or she need not prove *Sullivan* malice unless punitive damages are claimed. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974). (footnotes omitted)

As Justice Almon noted in the recent decision of *Gray* v. *WALA-TV,* 384 So. 2d 1062 (Ala. 1980): "This actual malice standard was further elaborated on in *St. Amant* v. *Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968); there it was stated that reckless disregard requires "...sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication."

Privilege is another issue which bears directly upon the issue of proof of malice.

Bronner contends that the court below was correct in finding that he was conditionally privileged to make public the results of his department's investigiation. The test in this jurisdiction for determining whether a conditional privilege exists is as follows:

> Where a party makes a communication, and such communication is prompted by duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest, the communication is privileged, if made in good faith and without actual malice. ***The duty under which the party is privileged to make the communication need not be one having the force of legal obligation, but it is sufficient if it is social or moral in its nature and defendant in good faith believes he is acting in pursuance thereof, although in fact he is mistaken.

Willis v. *Demopolis Nursing Home, Inc.,* 336 So. 2d 1117 (Ala. 1976), quoting *Berry* v. *City of New York Ins. Co.,* 210 Ala. 369, 98 So. 290 (1923).

> The question of whether a communication is privileged by reason of its character or the occasion on which it was made is a question of law for the judge.

Willis, supra.

Although the duties of the State Finance Director as set out in Title 41, Code 1975, do not specifically include informing the public of the results of statutorily prescribed investigations of state departments and agencies, we conclude that this activity comes within the penumbra of his official duties. The public has a general interest in the results of investigations disclosing governmental abuse or mismanagement. We, therefore, agree with the trial judge's determination that Bronner was cloaked with a conditional privilege.

This Court has further stated that "[w]here a communication is conditionally privileged, it is free from the legal imputation of malice and is actionable only if there is actual malice." *Willis* v. *Demopolis Nursing Home, Inc., supra.*

It is unclear from the record as to how the trial judge viewed the status of Wyatt and Fulton. As *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), and its progeny have mandated, the threshold question in a defamation case is the determination of the status of the allegedly defamed person as a public official, public figure or a private individual. This issue must be resolved before the court can determine what elements of proof of malice are required. The trial judge did not address the issue of status, and instead, decided the case on the basis of Bronner's and the Advertiser's qualified privilege. Our cases have held that once a qualified privilege has been found to exist, the plaintiff must allege and prove actual or express malice in order to recover. *Browning* v. *Birmingham News,* 348 So. 2d 455 (Ala. 1977); *Willis* v. *Demopolis Nursing Home, supra; O'Barr* v. *Feist,* 292 Ala. 440, 296 So. 2d 152 (1974).

Since *Sullivan* and its progeny have redefined actual malice in defamation cases brought by public officials or public figures, the reference to actual malice without further distinction has caused a considerable amount of confusion and ambiguity in interpretation and application of the two different standards of malice. In this jurisdiction actual or express malice in its tradi-

tional sense "may be shown by evidence of previous ill will, hostility, threats, rivalry, other actions, former libels or slanders, and the like ... or by the violence of the defendant's language, the mode and extent of publication, and the like." *Kenney* v. *Gurley,* 208 Ala. 623, 95 So. 34 (1934).

Prior to *Sullivan,* the preceding standard of actual malice was the only standard. *Sullivan,* however, redefined an old term to require a new and more stringent standard of proof in compliance with constitutional standards. "Actual malice" in its constitutional sense, therefore, means "with knowledge that it [the publication] was false or with reckless disregard of whether it was false or not." *Sullivan.*

It is apparent from the record that the trial judge fell prey to the confusion created by the interchangeable use of the single term "actual malice" to convey two separate concepts. The trial judge stopped short of a crucial determination in failing to reach the issue of the plaintiffs' status, and held that "actual malice" in conjunction with the privilege defense need only be shown in the traditional sense. *Willis* v. *Demopolis Nursing Home, O'Barr* v. *Feist, Kenney* v. *Gurley.* This would have been correct prior to *Sullivan* and its progeny, whether the plaintiffs were public or private persons, and still continues to be correct as to private individual plaintiffs.

Subsequent to *Sullivan,* however, it is mandatory that the plaintiff's status be determined initially, in order to next determine whether traditional malice or *Sullivan* malice must be shown. We hold, therefore, that the trial court erred in failing to make this initial determination.

Finally, we reach the basic issue presented by this appeal—whether summary judgment was appropriate under the particular circumstances of this case. The law in this jurisdiction, as set out below, is well settled as to the basic principles which govern in a review of a grant or denial of summary judgment.

> The party moving for summary judgment must clearly show, i.e., has the burden to show, that the other party could not recover "under any discernible circumstances." *Folmar* v. *Montgomery Fair Company, Inc.*, 293 Ala. 686, 309 So. 2d 818 (1975); see also, *Ray* v. *Midfield Park, Inc.*, 293 Ala. 609, 308 So. 2d 686 (1975).
>
> A motion for summary judgment may be granted only when there is no genuine issue as to a material fact and the movant is entitled to judgment as a matter of law. *Birmingham Television Corporation* v. *Water Works,* 292 Ala. 147, 290 So. 2d 636 (1974).
>
> The moving party has "the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." *Adickes* v. *Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970).
>
> Likewise, we consider the "Scintilla Rule" in connection with summary judgment. We held in *Folmar* v. *Montgomery Fair Company, Inc., supra,* that if there is a scintilla of evidence produced in plaintiff's favor on the issue of defendant's negligence, then summary judgment will not lie. As the majority of this Court pointed out therein, the plaintiff might escape having summary judgment rendered against him, yet still suffer the ignomy of defeat by way of directed verdict.

Loveless v. *Graddick,* 295 Ala. 142, 325 So. 2d 137 (1975).

In *Loveless,* we also adopted with approval the following statement by the U. S. District Court in *Goldwater* v. *Ginzburg,* 261 F. Supp. 784 (1966), aff'd 414 F.2d 324 (2nd Cir.), cert. denied, 396 U. S. 1049, 90 S.Ct. 701, 24 L.Ed. 2d 695:

> The issue of actual malice on the part of defendants seems peculiarly inappropriate for disposition by summary judg-

ment because it concerns "motive, intent, and subjective feelings and reactions."

Bronner and the Advertiser, as the moving parties, had the burden of proving the absence of a genuine issue as to any material fact. We find that they failed to meet this burden.

In the press release (set out previously) Bronner listed four categories of "questionable activities and management" which were discovered as a result of the investigation. According to Bronner's own affidavit, however, of these four categories only number two, the discovery of employees on the payroll who provided little or no service to the state, applied to Fulton, and only number four, the utilization of gratuities and/or agents in order to secure state business, directly applied to Wyatt. Bronner further stated, however, that because of Wyatt's supervisory position, "the responsibility of misconduct, inefficiency and mismanagement attributable to employees under his supervision which continued uncorrected by Wyatt, must be charged to him." In his affidavit, Bronner stated that: in response to a press question he gave the names of the six Commission employees who were fired; at no time did he make any charges about anyone—to the contrary when asked what charges had been made he responded "What charges? I have made no charges . . . ."; and as far as the committee was concerned the dismissals were based on qualifications and performance.

In their affidavits, both Wyatt and Fulton denied that they were guilty of any wrongdoing and stated that they were unaware of any allegations or charges against them until they read the newspaper article the morning following their discharge. Both of their letters of dismissal merely stated that their employment had been terminated based on qualifications and performance. Also Wyatt stated: "I have personally discussed my job performance with the defendant Bronner prior to my dismissal. At no time did the defendant Bronner make any accusation to me or state in any fashion that I had done

anything wrong or that I was not performing my job responsibilities in a satisfactory manner. In fact, his statements to me were to the contrary."

Both contend that the article charged them with criminal activity and that the average lay reader would have interpreted the article to mean that each of the named dismissed employees was guilty of all four categories of questionable activities. In *McGraw* v. *Thomason,* 265 Ala. 635, 93 So. 2d 741 (1957), we held:

> In determining their actionable character, the printed words are to be taken in their natural meaning, and according to the sense in which they appear to have been used and the idea they are adapted to convey to those who read them. A forced construction is not to be put upon them in order to relieve the defendant from liability, nor are they to be subjected to the critical analysis of a trained legal mind, but they must be construed and determined by the natural and probable effect on the mind of the average lay reader.

In light of the preceding authority we find that the article and accompanying headline presented a genuine issue as to a material fact as to whether these words imputed criminal activity and guilt of all four categories of misconduct to both Wyatt and Fulton. *Loveless* v. *Graddick.*

Furthermore, they (Wyatt and Fulton) contend that the statements were false and the Bronner knew they were false when he made them. Because of the preceding contradictions in the affidavits of the parties, we find that there is a genuine issue as to a material fact presented here. For these reasons summary judgment was inappropriate for defendant Bronner.

As to defendant Advertiser, we find as did the trial judge, that the Advertiser was protected by Bronner's conditional privilege to the extent that it reported fairly and accurately the

information released at the press conference. We find, however, that from the record before us a genuine issue as to a material fact existed, making the grant of summary judgment for defendant Advertiser also inappropriate. In *American Benefit Life Ins. Co.* v. *McIntyre, supra,* we held that a news reporter's focusing upon particular portions of a financial report (concerning plaintiff insurance company's financial status) to the exclusion of other relevant portions of the same report could present a genuine issue of a material fact which should be resolved trial. We find similar factual assertions in the record here. Bronner states in his affidavit that he made it clearly known that the employees were discharged because of qualifications and performance; however, the words "qualifications and performance" did not appear anywhere within the article, nor was there any allusion to this reason for dismissal. Moreover, we do not find in the record any evidence whereby it can be determined that the Advertiser made any independent investigation as to the truth or falsity of Bronner's statements.

REVERSED AND REMANDED.

Torbert, C.J., Maddox, Faulkner, Almon and Shores, JJ., concur.

Embry, J., concurs in the result.

Opinion handed down September 19, 1980

APPENDIX B

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

Civil Action No. CV-79-731-G

David H. Fulton,
Plaintiff,

v.

The Advertiser Company,
et. al.,
Defendants.

Civil Action No. CV-79-729-G

William B. Wyatt,
Plaintiff,

v.

The Advertiser Company,
et al.,
Defendants.

Civil Action No. CV-79-786-G

Raiford J. Martin,
Plaintiff,

v.

David G. Bronner,
Defendant.

ORDER

This case is now submitted to the Court on the Defendant's motion for summary judgment with affidavits attached,[1] Plaintiff Martin's response to motion for summary judgment, the Plaintiff's objections and motion to strike the affidavits filed by Defendants, the counter-affidavits of Plaintiffs Wyatt and Fulton, together with the argument of counsel and the memoranda of law submitted by the parties.

I.

Plaintiff's Motion To Strike Defendant's Affidavits And Materials

Plaintiffs have filed motions to strike the affidavits filed by Defendants in support of their motion for summary judgment assigning as grounds that the affidavits and other materials contain hearsay, opinions, and conclusions of the affiants.

Rule 56(e) ARCP provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

The requirements of Rule 56(e) are mandatory. Wright & Miller, Federal Practice and Procedure: Civil § 2738. A motion to strike is appropriate; however, the Court will disregard only

---

[1] A Rule 12(b)(6) ARCP motion to dismiss is converted into a motion for summary judgment under Rule 56 when the Court considers matters outside of the pleadings, whether or not a motion is so denominated. Papastefan v. B & L Const. Co., 356 So.2d 158 (Ala. 1978).

the inadmissible portions of a challenged affidavit and will consider the rest of it. Wright & Miller, *supra.* In addition, affidavits in support of a motion for summary judgment may set forth only such facts as would be admissible in evidence. *Hunter* v. *Austin Co.,* 336 So.2d 203 (Ala.App. 1976) cert. denied, 336 So.2d 208 (Ala. 1976). Likewise, those filed in opposition must adhere to the same rule of admissibility. See *Shapiro* v. *Health Ins. Plan of Greater N.Y.,* 7 N.Y.2d 56, 194 N.Y.S.2d 509, 512 (N.Y. 1959).

A.

Copies Of Pleadings Filed In Federal Actions

The Court denies the Plaintiff's motion to strike copies of all documents filed in case numbers: Civil Action No. 79-265-N, Civil Action No. 79-264-N, Civil Action No. 79-272-N, Civil Action No. 79-305-N, and Civil Action No. 79-313-N, all being actions filed in the United States District Court for the Middle District of Alabama.

B.

Affidavits Of Frazier, Raiford, And Jordan

Affidavits of these individuals were not filed in support of Defendants' motion for summary judgment and therefore, these grounds of Defendants' motion to strike are not well taken.

C.

Affidavit Of James E. Foy

If the Defendants filed their affidavit of Dr. Foy for the purpose of establishing the truth of the statements made by Mr. Wright to Dr. Foy, the Plaintiffs are correct that those portions of the affidavit should be stricken as hearsay; however, the Court accepts the affidavit only for the limited purpose of a

showing that certain statements were made to Dr. Foy and that Dr. Foy transmitted this information to Defendant Bronner.

D.

Affidavit Of David G. Bronner

The Plaintiff Martin's motion to strike the affidavit of Bronner is granted as to the following paragraphs: 10, 14, 16, 17, 22, 23, 24, 25, 26, 27, 30, 32, 36 and the supplemental affidavit of David G. Bronner.

The motion to strike of Plaintiff Martin is partially granted as to the following: the first sentence of paragraph 11, the first sentence of paragraph 31, and the first sentence of paragraph 37.

The motions to strike filed by Plaintiffs Fulton and Wyatt are granted in the same respects as the motion to strike filed by Martin; however, inasmuch as the motion filed by Plaintiffs Fulton and Wyatt do not specifically object to portions of the Bronner affidavit, any other matters which these Plaintiffs specifically sought to strike is due to be, and the same is, hereby denied.

II.

Merits

Defendants assert several defenses in their motion. The Court will only address the defense of Bronner's qualified privilege inasmuch as the Court finds that it is determinative of this case.

In *Browning* v. *Birmingham News,* 348 So.2d 455, 458 (Ala. 1977), the Court discussed the doctrine of qualified privilege as it exists in this jurisdiction, as follows:

> " ' Where a party makes a communication and such communication is prompted by duty owed either to the public or to a third party, or the communication is one in which

> the party has an interest, and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice. * * * The duty under which the party is privileged to make the communication need not be one having the force of legal obligation, but it is sufficient if it is social and moral in its nature and defendant in good faith believes he is acting in pursuance thereof, although in fact he is mistaken.' "

At this juncture, it is important to note that the phrase "actual malice" when used in conjunction with the privilege defense is not to be confused with the term "Sullivan malice."[2] Actual malice as used in conjunction with the privilege defense "may be shown by evidence of previous ill will, hostility, threats, rivalry, other actions, former libels or slanders, and the like." *Kenney* v. *Gurley,* 208 Ala. 623 626 (Ala. 1923).

Further, our Supreme Court in *Willis* v. *Demopolis Nursing Home, Inc.,* 336 So.2d 1117 at 1120, said as follows:

> "The question of whether a communication is privileged by reason of its character or the occasion on which it was made is a question of law for the judge. *O'Barr* v. *Feist,* 292 Ala. 440, 296 So.2d 152 (1974). Where a communication is conditionally privileged, it is free from the legal imputation of malice and is actionable only if there is actual malice. *Id.* The burden is on plaintiff to prove actual malice. *Interstate Electric Co.* v. *Daniel, supra.*"

This Court recognizes that summary judgment is often inappropriate in a libel action; however, the Court in *Loveless* v. *Graddick,* 295 Ala. 142 (1975), indicated that in a case involving qualified privilege, summary judgment may well be appropriate

---

[2] Mobile Press Register, Inc. v. Faulkner, 13 A.B.R. 1212, 1215 (Ala. April 6, 1979).

where no malice is shown. The Court also indicated in *Loveless* that in granting a summary judgment motion, it must be clear that no malice exists.

With the foregoing principles in mind, this Court need currently decide first whether the communications involved here were conditionally privileged and, second, whether the Plaintiffs have shown any evidence of actual malice sufficient to destroy the qualified privilege.

David G. Bronner was appointed to the position of Finance Director of the State of Alabama on March 14, 1979, by Governor Fob James. By virtue of being Finance Director he became a member of the State of Alabama Building Commission. Also by virtue of being Finance Director, he became Chairman of the Committee established by the Commission in 1967 to act on behalf of the Commission with respect to matters of personnel and financial administration of the technical staff of the Building Commission.[3]

Because he had had complaints concerning mismanagement within the Building Commission, Bronner began an investigation soon after he assumed the role of Finance Director. During the investigation, Bronner examined under oath persons both inside and outside of the Commission and also conducted conferences with several of these people. The investigations revealed incidences of what Dr. Bronner considered highly questionable employee conduct, under-qualified staff members, and incompetent work performance. On May 29, 1979, Bronner held a news conference at the State Capitol for the purpose of announcing the dismissals of the four Plaintiffs in this case. The next day, May 30, 1979, the *Montgomery Advertiser* published an account of the dismissals, giving the four specific justifications that Bronner cites in his affidavit:

---

[3] Defendant Bronner was Finance Director on the dates in question. State of Alabama Ex Rel. Meadows v. Bronner, Civil Action No. CV-79-397-P. (Cir.Ct. Mont. Cty., September 28, 1979).

1. The use of state employees on state time to do private business.

2. The discovery of employees on the payroll who provided little or no service to the state.

3. Allowing or initiating construction change orders resulting in contractors receiving greater profits.

4. The use of gratuities and agents in order to secure state business.

Plaintiff Martin,[4] in the complaint for slander, alleges that he has been injured with respect to his reputation and standing in the community. Plaintiffs Wyatt and Fulton allege both libel against the newspaper as well as slander against David Bronner as Finance Director.

After separating the objectionable from the non-objectionable in the Bronner affidavit and in reviewing the communications as alleged in the pleadings, this Court finds that the communications were privileged.[5] Having so found, the Court further finds that the Plaintiff's affidavits in opposition do not show any malice on behalf of Defendant whatsoever. The fact that the communications of the Defendant may be untrue does

---

[4] Plaintiff Adams was indicted on August 10, 1979, in a fourteen count indictment, each and every count thereof charging Plaintiff with perjury in connection with his testimony before a previous grand jury. State v. Adams, Case No. CC-79-781-P. (Cir.Ct.Mont.Cty.). On October 23, 1979, Adams pled guilty to Count XIV. On October 25, 1979, Plaintiff moved to dismiss his claim in Civil Action No. CV-79-746-G, and the claim was dismissed with prejudice.

[5] Colpoys v. Gates, 118 F.2d 16 (Ct.App.D.C.Cir.) is distinguishable from the case at Bar. The Colpoys court specifically held that defendant, a U.S. Marshall, was not under any duty to tell the public anything about the dismissal of his deputies or publicly to explain the reasons for their discharge. In the instant case, the Court finds that Bronner was acting in his general line of duty when he made comments to the assembled press.

not destroy the qualified privilege. *Vigoda* v. *Barton,* 348 Mass. 478, 204 N.E.2d 441, 26 A.L.R.3d 482 (1965). The New York Court of Appeals has also spoken to the question of qualified privilege: "Falsity is not sufficient for an inference of malice. It must be . . . consistent only with a desire to injure the plaintiff to justify . . . sending the question of malice to the jury." *Shapiro, supra* at 513.

The doctrine of qualified privilege is necessary in order for public officials to be able to do their jobs without fear of a libel suit being filed against them. "They [public officials] are entitled to be free, and beyond that the public interest requires that they be free, to engage in action which may have its genesis in honest error." *Vigoda, supra.*

As to the *Advertiser's* publication of the article concerning the Bronner press conference, the Court finds that the newspaper's account of the conference was fair. The conditional privilege with which Bronner was cloaked here protects the newspaper as well; the paper was merely printing the news as it found it.

It is therefore ORDERED that the Defendants' motions for summary judgment are due to be, and the same are, hereby GRANTED. It is further ORDERED that judgment be for the Defendants and costs are taxed against the Plaintiffs for which let execution issue.

DONE and ORDERED this the 30th day of October, 1979.

/s/ WILLIAM R. GORDON,
Circuit Judge

APPENDIX C

RELEVANT PORTIONS OF BRONNER'S AFFIDAVIT EXCLUDING THOSE STRICKEN BELOW

"WILLIAM B. WYATT"

"6. William B. Wyatt became Deputy Director of the Commission on May 1, 1973. Although the applicable statute (Section 41-9-141, Alabama Code of 1975) mandates the appointment of 'competent architectural and technical employees . . . necessary to effectuate the requirements of this article . . .' and although Wyatt's duties in the second ranking position on the Commission staff required exceptional architectural and technical competence, Wyatt was neither an architect nor an engineer. In addition, in view of his position and his supervision of employees of the technical staff and other employees of the Commission, the responsibility for misconduct, inefficiency and mismanagement attributable to employees under his supervision which continued uncorrected by Wyatt, must be charged to him.[1]

"I.

"Employees on State Payroll Who "Provided Little or No Service to the State

"7. Footnote 1 has already mentioned the inspector, Howard Wilson, who turned in few if any reports for three years. (His annual salary was $14,846.00, which reflected a raise of $1,014.00 on July 13, 1978.)

"8. Another employee, Mac Saxon, was on the payroll from May 4, 1977 to January 10, 1978; he performed no more than a week's work during this period. (His annual salary at the latter date was $6,266.00)

---

[1] For example, one building inspector, Howard Wilson, turned in few if any inspection reports for a period of three years. He was not discharged until I came to office and presented this circumstance to the Committee.

"9. Employee, John Cluck, salaried at $28,000.00 per year, engaged in the business of selling and exchanging gold certificates from his state office on state time with such a degree of notoriety that his activities became the subject of investigation by the Alabama Securities Commission. As recently as May 4, 1979, Edwin Hudspeth, Staff Director of the Alabama Energy Management Board, criticized Cluck's performance as exhibiting a 'lack of cooperation and unprofessional attitude.' Moreover, one Donald E. Little, who was hired on September 6, 1978 to work directly under Cluck as an energy inspector testified during my investigations that he had never performed any inspections. Cluck was employed in this capacity until discharged by the Committee.[2]

* * *

"12. As demonstrated more fully below (p. 10) Fulton's reports were confusing and often not properly routed. For example, his inspection reports for Guin Elementary School on March 5, 1979 reported that block masons were laying foundation walls, whereas his report of March 26, 1979 stated that 'block masons will start laying block March 27, 1979.' Fulton's annual salary at the time of his discharge was $17,420.00.

"13. Another building inspector, Ray Martin, was permitted to use a state automobile to engage in political activities on state time while on the state payroll. He was not discharged until I came to office and presented this circumstance to the Committee. His annual salary at that time was $16,094.00 (reflecting a raise of $2,262.00 on July 13, 1978).

---

[2] Although perhaps irrelevant to Cluck's performance, Little also testified that he saw a case of Honeywell thermostats in Hugh Adams' office.

II.

Allowing or Initiating Construction Change Orders or Otherwise Structuring Specifications Which Resulted in Contractors and Suppliers Receiving Greater Profits and the Channeling of Business on an Impermissible Basis

* * * *

"15. An unusual change order in connection with the construction of the Diagnostic Laboratory at Auburn University was permitted. The original architect on the project, Carl H. Lancaster, Jr., has refused to approve the change order on the ground that the specified saving to the State of Alabama was to be only $25,000, when in fact it should have been approximately $100,00 to $130,000. Lancaster's sworn testimony was that when the revisions were proposed, he asked three other contractors who were original bidders on the job to estimate the probable savings which would result from these changes, and the estimates ranged from $100,000 to $130,000.

* * * *

"18. Specifications for carpeting in state buildings were designed to benefit a supplier, McAdams Carpets, Inc. As architect Charles Humphries testified: 'You speck (sic) everybody out.'

"19. Replacement of office machinery furnished by one supplier with identical office equipment by another supplier. Wyatt's explanation to the original supplier was that the replacement became necessary because of 'political obligations.'[3]

---

[3] Alva Stuckey, Jr., President of Royal Office Equipment Company testified:

> "He [Wyatt] informed me that he had political obligations. Uh, through a company called Montgomery Office Equipment and when he was one of Governor Wallace's uh, what would

III.

Utilization of Gratuities or Agents in Order to Secure State Business

"20. Architect Carl H. Lancaster, Jr., gave sworn testimony that he had paid kickbacks to Hugh Adams, the then Director of Technical Staff.

"21. Architect, Martin K. Johnson, gave sworn testimony that he paid one Oscar Harper a 'promotional fee,' consisting of a percentage of his total architectural fee, in order to secure state business as a favored architect. The total amount of such fees paid by Johnson to Harper was over $20,000.

* * * *

"28. Failure to report damage to state automobile used by Wyatt.

"29. Activities of John Cluck described in paragraph 9 above.

V.

Additional Evidence of General Mismanagement

* * * *

---

you called them, cronies, and that he could not get the equipment from me but that he had an obligation with the other company. I tried to impress upon him that we had done business with the Building Commission. Miss Foster and the other people in the Building Commission were very pleased with their service and their backup and Miss Foster had indicated to me, when I asked her what was going on, she implied to me with, you know how you will when you have worked with someone as long, she was not at all pleased with having to do business with Montgomery Office Equipment Company because she had some unfavorable trying to call them when they needed repairs of things like this and they did not respond and did not come."

"31. * * * The activities of John Cluck have already been described. In order to safeguard his employment, it was necessary to replace an energy grant with equivalent state funds to be allocated to the Commission. Adams and Wyatt attempted to amend the Governor's general fund budget request for this purpose, despite the Governor's instructions that such amendments were to be cleared through him and despite the record of misconduct of John Cluck. (The evaluation by Hudspeth of Cluck has been noted above in paragraph 9.)

* * * *

"33. Moreover, the merit system employee who handles personnel matters for the Commission, . . . , testified:

> "At the present time the working conditions are almost unbearable as far as our administrative procedures and our leadership. We are not certain as to exactly what to do when and by that I mean we have had division chiefs who have been responsible to a point of uh a certain phase of office procedures and now it appears that those people really don't know what is going on and by that I mean they were department heads and they had control of their department at the present time there is no control of anything, uh its very haphazard as far as I'm concerned and who you answer to and this type of thing."

NACE ALLEN

"34. Adams and Wyatt themselves recommended that Allen be discharged. At a meeting of the Committee, Adams stated that 'there had been general criticism of the level of inspectors over the years and that he and Wyatt felt that these two inspectors [Nace Allen and J. V. Ashhurst] were among the worst.' Additional findings corroborate their evaluation of Allen, including information that the absence of inspection activities by Allen was something of a joke.

DAVID H. FULTON

"35. On the basis of the Adams and Wyatt evaluation of the building inspectors, and the more precise and meaningful criticism from such knowledgeable persons as Herbert and Stevenson, the Committee determined that the number of building inspectors could and should be reduced, and that those less qualified and most recently employed should be laid off first.

* * * *

"37. * * * Herbert, chief of the division of supervision, whose duty was to oversee inspection, testified under oath: "I don't know how he was hired'; and 'I don't know what kind of a professional he is.'

"38. W. G. Stevenson, Chief Engineer and now Director of Technical Staff of Commission, reported to me regarding Fulton:

> " 'All inspection reports were supposed to be routed through me but for at least six months prior to May 29, 1979 I'm not sure that I saw all of Fulton's reports. As for the reports that I saw there was nothing to indicate an unusual ability or awareness as a building inspector, in fact, there were some confusing reports.' (See letters of April 17 and May 14 attached to this affidavit as Exhibits 'A' and 'B'.)

"CIRCUMSTANCES OF DISCHARGE OF PLAINTIFFS

"39. The minutes of the meeting of May 29, 1979, signed by Dr. Teague, Representative Sasser, and me show the following:

> "A discussion took place concerning the number of building inspectors needed by the Commission. Members of the staff had advised the Committee, through the Chairman, that only three or four inspectors were necessary. It was their recommendation that Mr. Rutherford and Mr.

McCollough were the best inspectors, and that Mr. Kirk, III was developing suitably. Dr. Bronner made the motion to allow Mr. Stevenson to closely monitor Mr. Kirk's performance and to retain or dismiss him as he saw fit; and on the basis of qualifications and performance to dismiss the inspectors, Mr. Ray Martin, Mr. David Fulton and Mr. Howard Wilson. The motion was unanimously adopted.

"Further discussion of the personnel needs of the Commission followed with emphasis on the necessity of acquiring managers with better academic credentials and professional experience. After the qualifications and performance of the present management team were reviewed, Dr. Bronner moved that Mr. Hugh Adams and Mr. William B. Wyatt be dismissed. The motion was adopted unanimously."

"40. On that same day I issued a written statement to the news media entitled 'Press Conference' a copy of which is attached to this affidavit as Exhibit 'C'.

"41. In response to a question, I gave the names of the six employees referenced in the statement — names which included plaintiffs Wyatt and Fulton, but not Allen. The Committee had voted to dismiss Allen on April 19, 1979.

"42. At no time did I state that any charges had been or would be lodged against them. In fact, when asked by a reporter what charges had been made against any specific individuals, I answered, 'What charges? I have made no charges about anyone. As far as the Committee is concerned, they were dismissed because of qualifications and performance."

MICHAEL RODAK, JR.,

No. 80-830, 80-831

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID G. BRONNER, THE ADVERTISER COMPANY,
Petitioners,

v.

DAVID H. FULTON AND WILLIAM B. WYATT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

JERE L. BEASLEY
FRANK M. WILSON
BEASLEY & WILSON
P.O. Box 4537
Montgomery, Alabama 36102
(205) 269-2343
Counsel for Appellees.

December 22, 1980

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTIONS PRESENTED FOR REVIEW

I. Whether under the circumstances presented a decision of the Alabama Supreme Court reversing a summary judgment for defendants in a libel action is a "final judgment" as contemplated by 28 U.S.C. § 1257(3)?

II. Whether a plaintiff in a defamation action who has had the benefit of no discovery must present clear and convincing evidence of the defendants' state of mind to avoid summary judgment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction 7

II. This Case Is Not Ripe For Review By This Court 11

III. No Constitutional Rights of Petitioners Have Been Violated 17

CONCLUSION 20

APPENDIX A – Affidavit of William B. Wyatt 1a

APPENDIX B – Affidavit of David H. Fulton 5a

TABLE OF AUTHORITIES

Cases:

Adickes v. Kress & Company, 398 U.S. 144 (1970) 3

Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 838 (5th Cir. 1970) 19

Brady v. Southern Railway Company, 320 U.S. 476 11

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) 9, 10

Curtis Publishing Co. v. Butts, 399 U.S. 130 (1967) 12, 17, 19

Garrison v. Louisiana, 379 U.S. 64 (1964) 17, 19

Gertz v. Robert Welch, 418 U.S. 323 (1974) 11, 17

Herbert v. Lando, 441 U.S. 153 (1979) 15, 17

Hutchinson v. Proxmire, 443 U.S. 111 (1979). 13, 14, 17

Page

Cases, continued:

Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974) 8, 9, 10

Mills v. Alabama, 384 U.S. 214 (1966) 8

New York Times v. Sullivan, 376 U.S. 254 (1964) . . . . . *passim*

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 8

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 8

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 8

Rosenblatt v. Baer, 383 U.S. 73 (1966) 12, 13

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 12, 17

St. Amant v. Thompson, 390 U.S. 727 (1968) 12, 15

Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir. 1979) 19

Time, Inc. v. Pape, 401 U.S. 279 (1971) 17

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 12, 17

Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969) 18

Wolston v. Readers' Digest Association, Inc., 443 U.S. 137 (1979) 14, 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-830, 80-831

DAVID G. BRONNER, THE ADVERTISER COMPANY,
Petitioners,

v.

DAVID H. FULTON AND WILLIAM B. WYATT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this court under 28 U.S.C. §1257(3). Respondents respectfully submit that this Court lacks jurisdiction because there has been no "final judgment" by the highest court of a state as required by that section.

STATEMENT OF THE CASE

After reviewing the Petitioner's Statement of the Case, Respondents feel it would benefit the Court to hear their version of the circumstances which bring this matter before it. Plaintiffs/Respondents William B. Wyatt and

David H. Fulton (hereinafter "Respondents") filed separate complaints seeking compensatory and punitive damages against Defendants/Petitioners David G. Bronner (hereinafter "Petitioner Bronner") and the Advertiser Company (hereinafter "Petitioner Advertiser") on June 19, 1979. Both Petitioners filed motions to dismiss as to each complaint raising numerous grounds. On July 24, 1979, Petitioners moved to consolidate the Respondents' cases with those of several individuals who are no longer parties to this litigation.

Petitioners filed a motion for protective order and for stay of discovery on the grounds that the pendency of certain federal court actions filed by Respondents raised serious questions of jurisdiction and discovery should, therefore, be stayed until the trial court ruled on Petitioner's motions to dismiss. Although no written order was entered, the trial court orally informed Respondents' counsel that Petitioners' motion was well taken and that discovery would be stayed until the court determined whether these actions could proceed in Circuit Court. At the time summary judgment was granted by the trial court no discovery of any type had taken place.

On August 7, 1979, the Petitioners' motion to consolidate was granted, motions to dismiss on the grounds of the pendency of similar actions in Federal Court were denied and a hearing was set on the remaining grounds of the motions to dismiss. Petitioners filed the affidavit of David G. Bronner in support of their motions. Respondents filed affidavits in opposition and a motion to strike pursuant to Rule 56(e), Alabama Rules of Civil Procedure.

After extensive argument by all parties, the Circuit Court granted summary judgment in favor of both Petitioners after partially granting Plaintiffs' motion to strike.[1] In its order of October 30, 1979, the court ruled that Petitioner Bronner's statements were qualifiedly privileged and that there was no evidence in the record to indicate actual malice. The Court further held that Petitioner Advertiser's account of the press conference was fair and that Petitioner Bronner's privilege protected it as well. The trial court did not reach the question of whether Respondents were public officials or public figures so that the *New York Times v. Sullivan*[2] actual malice standard would apply.

On appeal the Alabama Supreme Court correctly found a genuine issue of material fact, reversed the summary judgments entered by the trial court and remanded the case for trial.[3] The Supreme Court recognized the heavy burden on a party moving for summary judgment and applied the universally accepted principle that the materials lodged must be viewed in the light most favorable to the opposing party. *See Adickes v. Kress & Company*, 398 U.S. 144 (1970).

The circumstances which form the basis for Respondents' actions for defamation are essentially undisputed. After his appointment as Finance Director, Petitioner

---

[1] The Bronner affidavit excluding the portions stricken by the trial court appears as Appendix C to the Petition for Writ of Certiorari.

[2] 376 U.S. 254 (1964).

[3] The opinion of the Alabama Supreme Court is set out in full in Appendix B to the Petition for Writ of Certiorari.

Bronner conducted what he termed an "extensive investigation" into alleged wrongdoing of the staff of the Alabama Building Commission. At the conclusion of this investigation, Petitioner Bronner called a news conference at which he issued a written press release and made statements to the assembled members of the press. Four categories of alleged "questionable activities and management" are contained in the press release and appear in the newspaper article:

1. The utilization of state employees on State time to do private business.
2. The discovery of employees on the payroll who provided little or no service to the State.
3. Allowing and/or initiating construction change orders resulting in contractors receiving greater profits.
4. The utilization of gratuities and/or agents in order to secure State business.

According to his affidavit testimony, Petitioner Bronner made additional statements to the members of the press he had assembled. The record is in conflict as to what those oral statements were. Bronner testified he stated that he had made no charges "about anyone . . . they were dismissed because of qualifications and performance." However, Petitioner Advertiser's news article fails to mention that statement at all and implies that the reasons for Respondents' discharge were the "questionable activities and management" set out above.

Respondents by affidavits specifically stated that Petitioner Bronner's accusations of misconduct were false. Respondent Wyatt additionally testified that Bronner had told him his job performance was satisfactory. Of course,

it was impossible for Respondents to offer direct evidence of Petitioner Bronner's state of mind.

The evidence that Petitioner Bronner knew the statements he made were false which precluded summary judgment comes from his own affidavit. He sets out in more than forty numbered paragraphs an extensive litany of allegations of wrongdoing in the Building Commission. However, as the Alabama Supreme Court recognized,[4] nowhere in that affidavit is there any evidence that Respondent Fulton was guilty of any of the four categories of misconduct and there is only minimal evidence that Respondent Wyatt was guilty of one of the four.[5] Hence, the Alabama Supreme Court determined that a material question of fact remained whether Petitioner Bronner knew the statements he made to be false.

The Alabama Supreme Court additionally ruled a material question of fact remained whether or not Petitioner Advertiser had knowledge that the statements in its article were false. Petitioner Bronner's testimony was that he emphasized to the members of the press that the dismissals were because of "qualifications and performance" and that no charges had been made about anyone. Petitioner Advertiser's article not only failed to mention

---

[4] Appendix A to Petition for Writ of Certiorari, p. A-11.

[5] The "evidence" referred to in the Bronner affidavit is essentially rumor, speculation and unsupported allegations by individuals who did not receive the favored treatment they felt they deserved before the Building Commission. Of course, Respondents have not had the opportunity to depose these individuals and question them as to their motives. The relevant portions of the news article are set out in the Alabama Supreme Court opinion which is contained in Appendix A to the Petition for Writ of Certiorari.

"qualifications and performance" as a reason for dismissal, but was published under the headline "Officials Fired Following Probe." The only possible interpretation of the news article is that Respondents were fired because of the four categories of wrongdoing set out therein.[6]

REASONS FOR DENYING THE WRIT

In *New York Times v. Sullivan*, and its progeny this Court has attempted to strike a balance between two competing policy interests: (1) freedom of speech and of the press as protected by the First Amendment, and (2) the right of individuals to be compensated for the harm inflicted on them by defamatory falsehood. Petitioners seek to have this Court grant certiorari to decide whether a defamation plaintiff must adduce clear and convincing evidence of *Sullivan* malice to escape a summary judgment for defendant.[7] This Court should deny the Petition for Certiorari because: (1) there has been no final judgment as required by 28 U.S.C. § 1257, (2) the current record is inadequate to determine whether the *Sullivan* malice burden should even apply, and (3) Petitioners have shown no violations of rights guaranteed them by the Constitution.

---

[6]The relevant portions of Petitioner Advertiser's article are contained in the opinion of the Alabama Supreme Court which is Appendix A to the Petition for Writ of Certiorari.

[7]Petitioners assume the *Sullivan* standard applies to non-media as well as media defendants although this Court has never considered that issue. Because the Petition should be denied regardless Respondents will follow the same assumption although they contend a lesser standard should apply to non-media defendants.

I.

THIS COURT LACKS JURISDICTION OF THE PETITION FOR CERTIORARI

Petitioners seek a review of a decision of the Alabama Supreme Court reversing a summary judgment in their favor and remanding the case for trial. Petitioners seek to invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1257, which reads as follows:

> *Final judgments* or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or *where any title, right, privilege or immunity is specially set up or claimed under the constitution*, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> * * *

(emphasis supplied).

The requirement that a state court judgment be final in order to be reviewed by this Court recognizes the inconvenience and cost of piecemeal review of cases, minimizes the intrusion into the state judicial function and avoids the decision of constitutional issues which can be decided on non-constitutional grounds during the course of the litigation. Over the last several decades this court has carved out several exceptions to the so-called "finality

requirement."[8] Petitioners cite *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), for the proposition that the instant case is ripe for review. Petitioners' reliance on that decision is misplaced. In *Tornillo* this Court dealt with the constitutionality of a Florida criminal statute requiring a newspaper who assailed the character of a political candidate to grant that individual space in the paper to reply. After the Miami Herald published an editorial severely critical of Tornillo, a candidate for the state legislature, but refused to print his reply, the candidate brought an action in circuit court pursuant to the statute. The trial court held the "right of reply" statute unconstitutional but on appeal the Florida Supreme Court overturned that decision and remanded the case for trial. This court held the judgment of the Florida Supreme Court "final" under 28 U.S.C. § 1257. The circumstances of *Tornillo* which prompted this court to review it readily distinguish it from the case *sub judice*.

First and foremost, both parties in *Tornillo* agreed this Court had jurisdiction and urged it to decide the question of the constitutionality of the Florida statute. *See* 418 U.S. at 246. Secondly, as both parties recognized, the uncertainty of the constitutional validity of that statute restricted the exercise of First Amendment rights. The case arose during an election year so that delaying a determination of the constitutional issue would have left undecided whether it was necessary for newspapers to

---

[8] *See Mills v. Alabama*, 384 U.S. 214 (1966); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

offer a right of reply to candidates and if so under what circumstances. Additionally the newspaper challenged the statute on vagueness grounds claiming it could not determine how and when to comply with the statute even if compliance was required.

No such extenuating circumstances are present in the instant case. Alabama law is clear that individuals and newspapers can be required to compensate the victims of defamatory statements made with knowledge of falsity or with reckless disregard of falsity. That law follows the teaching of this Court in *Times v. Sullivan* and its progeny and balances the interests of freedom of speech and of the press with the right of individuals to redress for defamation.

Since *Tornillo* this Court rendered its decision in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), and discussed in detail the circumstances in which it will review a state court judgment when additional proceedings are anticipated in the state courts. This Court set up four categories of such cases which will be considered "final" for purposes of Supreme Court review. The Court considered *Tornillo* in the fourth of these categories which it described as:

> those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. 420 U.S. at 482-83.

Respondents respectfully submit that the circumstances of the instant case fall outside that category. This Court's determination of the issues Petitioners raise would not preclude further proceedings in this litigation as it did in *Cox* and *Tornillo*. In those cases the petitioners questioned the constitutionality of state statutes which provided plaintiffs with state law causes of action. A determination that the statutes on which Plaintiffs relied for recovery were unconstitutional necessarily ended the litigation. In the instant case Petitioners claim that their First Amendment rights were violated by the application of a state procedural rule which precluded summary judgment in their favor. Even if the Court agreed with the Petitioners' contention the case must be remanded to state court to determine if summary judgment was proper under whatever evidentiary standard this Court imposed.[9] In addition, before Petitioners argument has any validity, a determination must be made whether these Respondents are public officials, public figures or private individuals. That determination is impossible without further proceedings below.

The fact that this Court's decision will not end this litigation makes the policy considerations discussed above weigh heavily against this Court granting the Petition. In order to avoid piecemeal adjudication of the case this Court should avoid determining the weight of evidence which a public official or public figure must adduce to avoid summary judgment until enough facts are before the court below to allow a determination whether these

[9] Indeed as Respondents argued in brief to the Alabama Supreme Court summary judgment would be inappropriate on this record regardless of the standard required.

Respondents are, in fact, public officials or public figures. A determination, as is very likely, that these Respondents fit neither category would eliminate the necessity of this Court reaching that constitutional issue.

Perhaps more importantly, these Petitioners ask this Court to intercede into a state court civil proceeding and specify the standard of proof which a state court must use in determining a purely procedural issue.[10] There could be no greater interference into the state judicial function. Respondents submit that such an intrusion would rarely, if ever, be warranted. Certainly it is not when further state proceedings could eliminate the need to decide the constitutional question.

II.

THIS CASE IS NOT RIPE FOR REVIEW BY THIS COURT

Even if this Court determines it has jurisdiction pursuant to 28 U.S.C. §1257(3), it should deny the Petition for Certiorari. The state of the record below prevents a well-reasoned determination of any of the constitutional issues Petitioners raise. The decision below was made on a bare-bones record—no answers have been filed by Petitioners and absolutely no discovery has taken place. The

---

[10]Petitioners refer the Court to *Brady v. Southern Railway Co.*, 320 U.S. 476, to argue that such intervention is appropriate. *Brady* dealt with the amount of evidence necessary to get to the jury under the Federal Employees Liability Act. This Court held that there must be a uniform national rule as to the amount of evidence necessary under a federal law right to recover. 320 U.S. at 479-80. On the other hand, this Court has recognized that a right of action a state grants its citizens for defamation is a matter left to the states with this Court's role limited to establishing minimal constitutional standards which must be met. *See Gertz v. Robert Welch*, 418 U.S. at 347 (1974).

only material filed by Petitioners to support their respective motions was the self-serving declaration by Petitioner Bronner that his statements were true.[11] Further, there is not sufficient evidence in this record to determine whether Respondents are public figures as that term is defined in the teachings of this Court.

Since its landmark decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court has attempted to fashion a rule which assures the vigorous debate of public issues protected by the First Amendment and at the same time affords protection to the reputations of individuals. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*; 399 U.S. 130 (1967); *Rosenblatt v. Baer*, 383 U.S. 73 (1966). The threshold question in any libel suit is the status of the allegedly defamed plaintiff. If he is a public official[12] or public figure[13] he faces the heavy burden of proving that the defendant "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*. 390 U.S. 727 (1968).

The trial court failed to make the crucial determination of these respondents' status. While that determination is one of law for the trial judge, *Rosenblatt v. Baer*, 383 U.S. 75 (1966), it cannot be made in a vacuum.

---

[11] *See St. Amant v. Thompson*, 390 U.S. 727 (1968) where Justice White writing for the majority stated "The defendant . . . cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."

[12] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[13] *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

> [I]t is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.' " *Rosenblatt, supra,* 383 U.S. at 88.

As this Court has recognized, albeit in dicta, the term "public official" cannot possibly be thought to include all public employees. *Hutchinson v. Proxmire*, 443 U.S. 111, 119 (1979). Rather it includes only those who "have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.[14] The employees' position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.[15] The current record provides little factual basis for making such a determination as to these Respondents. The evidence which is present favors the determination Respondents are private individuals.

The Bronner affidavit merely states that Respondent Wyatt was Deputy Director of the Technical Staff of the Building Commission and had supervision over its employees.[16] The record does not disclose the number of employees he supervised, the duties they performed or any responsibility Respondent Wyatt exercised which made him the focus of public attention. The sworn testimony of Wyatt, on the other hand, is that the Building Commission was not a visible agency and that he never had been involved in any controversy which

---

[14] *Rosenblatt, supra.*

[15] *Id.* at 87, footnote 13.

[16] Petition for Writ of Certiorari, Appendix C, p. A-22.

brought him publicity.[17] From the record below it is impossible to determine that Respondent Wyatt had "substantial responsibility for control over the conduct of governmental affairs."

The only evidence in the record as to Respondent Fulton is merely that he was a building inspector with the State Building Commission and that it was determined too many inspectors had been employed.[18] There is no evidence what the responsibilities of that position are. Fulton's sworn testimony, however, tells us he performed "a great number of inspections on various kinds of public buildings."[19] He also stated that he received no publicity while performing his job. Certainly from this record it cannot be said that Respondent Fulton "had substantial responsibility for control over the conduct of governmental affairs." Indeed there is no evidence he had control over or responsibility over anything other than the low-level position he held.

While Petitioners take the position Respondents are public officials[20] the actual malice burden of *Times v. Sullivan* would also apply if Respondents were deemed public figures. In two very recent cases this Court considered the definition of that term. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 137 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). Those cases suggest an individual can obtain the status of public in

---

[17]Appendix A, p. 4a.

[18]Bronner affidavit, Petition for Writ of Certiorari Appendix C, p. A-23, A-27.

[19]Appendix B, p. 5a.

[20]Petition for Writ of Certiorari, p. 14.

two ways: (1) by holding a position of persuasive power and influence, or (2) by thrusting himself to the forefront of a public controversy in order to influence the resolution of the issues involved. 443 U.S. S at 134-135, 165. In both cases this Court undertook an in depth factual analysis to determine of the plaintiffs fell within the definition of "public figure." The record in the instant case is devoid of the evidence necessary to make such a determination. The minimal evidence which is present supports the conclusion Respondents were not public figures.

After weighing competing policy interests this Court determined in *Times v. Sullivan*, that in order for a public official to recover damages for defamation he must prove not only that the defamatory statements made were false but that the publisher had actual knowledge of falsity or reckless disregard of the same. Proof that a reasonable man should have known the statements were false is not enough rather "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731. This Court has viewed that question as essentially one of intent and has ruled that a plaintiff is entitled to explore by discovery the subjective state of mind of the Defendant on issues called directly into question by the *Sullivan* standard. *Herbert v. Lando*, 441 U.S. 153 (1979). Evidence of a publisher's intent is by its nature completely within the defendant's possession and available to plaintiff only through discovery.

Respondents in this case have had no opportunity to pursue discovery of any type. At the same time they filed their respective motions to dismiss, Petitioners filed a motion to stay discovery. Respondents had previouslv

propounded lengthy interrogatories to Petitioner Bronner. As a result of the stay of discovery, Respondents were foreclosed from the only available source of evidence needed to meet its burden at trial.

The issue raised by Petitioners is the evidentiary burden on a defamation plaintiff to survive a defendant's summary judgment motion. Petitioners argue that the application of Alabama's scintilla rule has a "chilling effect" on free speech and press. Presumably Petitioners take the position that *Sullivan* requires the application of a clear and convincing test on motion for summary judgment. (*See* Petition For a Writ of Certiorari, p. 7). A discussion of that questionable position requires an exploration of summary judgment law in general.

Since the right to trial by jury is at stake it is universally accepted that the function of a court on motion for summary judgment is to determine whether there are factual issues to be tried and not to dispose of any factual issue.[21] It is elementary that the moving party has the burden of establishing the absence of any genuine factual issue.

In the instant case if the *Sullivan* standard is applicable, the issue involved is without question Petitioners' states of mind at the time the defamatory statements were made. Without the benefit of discovery as to those states of mind, there cannot possibly be a well-reasoned determination of whether Petitioners knew the statements made were false.

---

[21] *See* 6 Moore's Federal Practice, paragraph 56.04[1], at 56-66 to -69; Id., paragraph 56.15 [1.8] at 56-391 to 395.

III.

NO CONSTITUTIONAL RIGHTS OF PETITIONERS HAVE BEEN VIOLATED

Petitioners assert that their First Amendment rights have been violated by the application of Alabama's scintilla rule in denying them summary judgment. As Petitioners correctly point out, some sixteen years ago this Court in a landmark decision imposed a heavy burden on a public official who seeks to recover in a defamation action against a newspaper. *New York Times v. Sullivan*, 376 U.S. 254. Since that decision this Court has handed down a number of defamation decisions and applied the *Sullivan* standard to a variety of circumstances.[22] From all of those decisions one principle is clear: the privilege afforded those who comment on public officials or public figures is not absolute. There is no protection afforded publication with knowledge of falsity or reckless disregard for falsity. Neither are defamatory statements concerning private individuals constitutionally protected. These limitations are the result of this Court's recognition of the right of an individual to recover for injury to his reputation.

In asserting denial of their constitutional rights Petitioners content that summary judgment should be preferred in a defamation action. Petitioner, however, can point

---

[22] *See, Wolston v. Reader's Digest Association*, 443 U.S. 137 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Herbert v. Lando*, 441 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

to no decision of this Court which supports that contention. To the contrary, the only time this Court discussed that contention it was stated:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and does not lend itself to summary disposition. (citations omitted).

Some lower courts have embraced the argument that summary judgment should be preferred. Petitioners cite a number of cases for that proposition. A closer analysis of those decisions reveals the inapplicability of that "so-called 'rule" to this case. The cases from the United States Court of Appeals for the Fifth Circuit provide graphic examples. *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969) cert. denied, 395 U.S. 992, is cited by Petitioner. Rather than suggest summary judgment should be preferred where actual malice was at issue the court held:

> Where, however, it is plain that the record has been fully developed by depositions and affidavits on a motion for summary judgment, and such record demonstrates that construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper.

406 F.2d at 570. That decision in no way departs from the traditional standard in determining whether summary judgment is appropriate. More recent cases from the Fifth Circuit which have upheld summary judgments for

libel defendants recognize the necessity of a fully developed record.[23]

In the instant case no discovery has taken place and the record is anything but "fully developed." Even the minimal record which has been made contains sufficient evidence to create a material question of fact whether Petitioners "entertained serious doubts as to the truth" of their publication.

Although urged to do so, this Court has repeatedly refused to grant publishers and broadcasters absolute immunity from liability for defamation. *See New York Times v. Sullivan, supra,* (Black, J. concurring); *Garrison v. Louisiana*, 379 U.S. at 80 (opinion of Douglas, J.); *Curtis Publishing Co. v. Butts*, 388 U.S. at 170 (opinion of Black, J.). By asking that this Court hold that Respondents, without the benefit of any discovery, must produce clear and convincing proof of Petitioners' actual malice to survive a motion for summary judgment, Petitioners seek to overrule years of precedent and grant publisher absolute immunity from liability for defamation statements. Respondents respectfully submit that this Court should deny the Petition for Writ of Certiorari.

---

[23] *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 838 (5th Cir. 1970); *Southard v. Forbes, Inc.*, 588 F.2d 140 (5th Cir. 1979).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JERE L. BEASLEY
FRANK M. WILSON
BEASLEY & WILSON
P.O. Box 4537
Montgomery, Alabama 36102
(205) 269-2343
Counsel for Respondents.

APPENDIX A

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

Civil Action No. CV-79-731-T

David H. Fulton,
Plaintiff,

v.

The Advertiser Company, et al.,
Defendants.

Civil Action No. CV-79-729-G

William B. Wyatt,
Plaintiff,

v.

The Advertiser Company, et al.,
Defendants.

AFFIDAVIT OF WILLIAM B. WYATT

Personally appeared before me, the undersigned authority, William B. Wyatt, who, being first duly sworn, deposes and says as follows:

My name is William B. Wyatt. I am a resident citizen of Montgomery County, Alabama, and am Plaintiff in the above-styled cause entitled William B. Wyatt versus The Advertiser Company, et al., now pending in this Court. I was employed by the State Building Commission under and by virtue of Code of Alabama, Section 41-9-141(c). I served as Deputy Director of the Technical Staff of the Commission for several years up until the 29th day of May, 1979. I was dismissed from my employment by the Defendant Bronner, Dr. Wayne Teague, and Representative James Sasser on said date.

I had worked for the Commission for several years prior to said date. I served on the Planning Commission for the City of Montgomery for eight years. I also had a general contractor's license and owned my own construction firm for approximately 15 years. One of the jobs I did was a $1,600,000.00 project at Ft. Rucker, Alabama in 1955-1956.

While serving as an employee of the State Building Commission, I performed my duties and responsibilities in a good and proficient manner. At no time was I disciplined by the Commission, the Chairman, Vice-Chairman, or any other member of the Commission. At no time did I commit my crime or become involved in any criminal activity while serving as an employee of the State Building Commission. I never received any kick-backs or any other illegal payments of money during the entire time that I served the State Building Commission as an employee. I have personally discussed my job performance with the Defendant Bronner prior to my dismissal. At no time did the Defendant Bronner make any accuasation to me or state in any fashion that I had done anything wrong or that I was not performing my job responsibilities in a satisfactory manner. In fact, his statements to me were to the contrary. I had no reason to believe that he was dissatisfied in any fashion with the manner in which I had performed my job responsibilities. I realized that an investigation was being made by the Defendant Bronner prior to my dismissal, but at no time was I informed that any investigation was directed at me. I am personally unaware of any person connected in any fashion with the State Building Commission taking kick-backs or illegal payments from contractors, architects, or any other person or company.

The position I held with the Commission did not require any special training. I have never claimed to be an architect nor a trained engineer. I did, however, have extensive experience in the construction business over the years. At one time I served the City of Montgomery in an official capacity which required expertise in the area of construction.

I am personally acquainted with David H. Fulton, who was employed by the State Building Commission as a building inspector. Mr. Fulton was not hired as the result of any political pressure. Mr. Fulton's hiring was based solely on his own qualifications and experience as a building inspector. I know personally that his job performance with the State Building Commission was quite satisfactory.

I realized for the first time that the Defendant Bronner was charging me with criminal activities when I read the account of his news conference in the Montgomery Advertiser on May 30, 1979. From that day forward, I have received a great deal of contempt, ill-will, and derogatory statements from persons who read the article appearing in The Montgomery Advertiser on said date. A great number of my personal friends have discussed the newspaper article with me and the comments by the Defendant Bronner since the 30th day of May, 1979. All of my friends tell me that the general impression amongst the persons who read the newspaper article was that I had been accused of a crime by the Defendant Bronner.

During the entire time that I was employed by the State Building Commission I never received any publicity of any sort. To my knowledge my name never appeared in any newspaper article or other publication. I did my job in a low-key manner but at the same time effectively.

I never sought publicity and was never involved in any controversy that brought publicity to me. The Building Commission itself was relatively small insofar as employees were concerned during the time I spent with the Commission. We were not a visible state agency at any time during my tenure.

I know for a fact that I am not guilty of any of the accusations made against me by the Defendant Bronner.

I fully realize that this affidavit will be filed by my attorneys in opposition to a motion filed by the Defendants in this cause. All of the above information is based on personal knowledge.

/s/ William B. Wyatt
William B. Wyatt

APPENDIX B

AFFIDAVIT OF DAVID H. FULTON

Personally appeared before me, the undersigned authority, David H. Fulton, who, being first duly sworn, deposes and says as follows:

My name is David H. Fulton. I am a resident citizen of Jefferson County, Alabama. My home is in Bessemer, where I have lived for many years. I am the Plaintiff in the above-styled cause entitled David H. Fulton versus The Advertiser Company, et al., now pending in this Court. I was employed by the State Building Commission as a building inspector under and by virtue of Code of Alabama, Section 41-9-141(c). I served as a building inspector for the Commission from the date of my employment up until the 29th day of May, 1979. I was the dismissed from my employment by the Defendant Bronner, Dr. Wayne Teague, and Representative James Sasser by letter which stated:

> The Personnel and Finance Committee of the State Building Commission, having met this the 29th day of May, 1979, to review the qualifications and performance of Commission employees, you are hereby advised that the Committee has terminated your employment, effective the close of business today.

I had worked for the City of Bessemer for several years as a building inspector, prior to coming to work for the State Building Commission. I had an excellent record with the City of Bessemer and earned much valuable on-the-job experience.

While serving as an employee of the State Building Commission, I performed my duties and responsibilities in a good and proficient manner. I worked hard and did a great number of inspections on various kinds of public

buildings. At not ime was I disciplined by the Commission, or by any individual member of the Commission. At no time did I commit any crime or become involved in any criminal activity while serving as an employee of the State Building Commission. I never received kick-backs or any other illegal payments of money during the entire time that I served the State Building Commission as an employee. I tried to discuss my job performance with the Defendant Bronner after my dismissal, but he refused to see me and turned me over to one of his assistants. I talked with the assistant who told me I was fired solely because I was serving at the pleasure of the Commission. He told me that the Commission had nothing against me and no proof of any wrong-doing on my part. I believe the assistant'a name was John Pappanastos. At no time did the Defendant Bronner make any accuastion to me or state in any fashion that I had done anything wrong or that I was not performing my job in a satisfactory manner. I had no reason to believe that the Commission was dissatisfied in any fashion with the manner in which I had performed my job. I had no knowledge that an investigation was being made by the Defendant Bronner or anybody else prior to my dismissal. At no time prior to my dismissal was I informed that any investigation was directed at me. I have no knowledge of any person employed in any manner with the State Building Commission who took any kick-backs or illegal payments from contractors, architects, or from any other person or company.

I was fully qualified for the position I held with the Commission. I have had extensive experience in the inspecting of buildings during construction over the years.

I am personally acauainted with William B. Wyatt, who was employed by the State Building Commission as the deputy director in charge of the Commission's technical staff. I did not know him prior to November of 1978. I did not get my job through politics, nor did I depend on any politician to secure the job for me. I applied for the job and was hired. I went to work and did my best.

My hiring was based solely on my own qualifications, background, and experience. I know personally that my job performance with the State Building Commission was quite satisfactory.

I realized for the first time that the Defendant Bronner was charging Mr. Wyatt and me with criminal activities when I read the account of his news conference in the edition of the Montgomery Advertiser dated May 30, 1979. From that day forward, I have received a great deal of contempt, ill-will, and derogatory statements from persons who either read the article appearing in the Montgomery Advertiser on said date or heard accounts of the article. A great number of my friends have discussed the newspaper article with me and the comments by the Defendant Bronner since the 30th day of May, 1979. All of my friends tell me that the general impression amongst the persons who read the newspaper article was that I had been accused of a serious crime or crimes by the Defendant Bronner.

There are hundreds of people who will testify to my honesty, good reputation, and good work background.

During the entire time that I was employed by the State Building Commission I never received any publicity of any sort. I never came to Montgomery unless requested to come by my superiors. My name never appeared

in any newspaper article or other publication. I simply did my job in a low-key manner, but at the same time in an effective and professional manner. I never sought publicity and was never involved in any controversy that brought publicity to me. I worked out of Bessemer in an area assigned to me by my superiors.

I know for a fact that I am not guilty of any of the accusations made against me by the Defendant Bronner. I have been unable to obtain employment since my dismissal and based on the response to my requests for employment, it is my opinion that the Defendant Bronner's accusations and the reporting of his news conference by the Montgomery Advertiser and subsequent talk amongst people are the reasons.

I fully realize that this affidavit will be filed by my attorneys in opposition to a motion filed by the Defendants in this cause. All of the above information is based on personal knowledge.

/s/ David H. Fulton
David H. Fulton

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I, the undersigned, a Notary Public in and for said State and said County, hereby certify that William B. Wyatt and David H. Fulton, whose names are signed to the foregoing affidavit, and who are known to me, acknowledged before me on this day that, being informed of the contents of same, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 19th day of September, 1979.

/s/ Judith Ann Head
Notary Public

No. 80-830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE ADVERTISER COMPANY,
Petitioner,

v.

DAVID H. FULTON and WILLIAM B. WYATT,
Respondents.

On Petition for a Writ of Certiorari
To The Supreme Court of Alabama

REPLY BRIEF OF PETITIONER

STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, AL 36101

M. ROLAND NACHMAN, JR.
P. O. Box 668
Montgomery, AL 36101
(205) 834-2222
Counsel of Record for Petitioner

WYCHE, BURGESS, FREEMAN AND PARHAM
P. O. Box 10207
Greenville, SC 29603
Of Counsel

DAVID L. FREEMAN
P. O. Box 10207
Greenville, SC 29603
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

No. 80-830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE ADVERTISER COMPANY,
Petitioner,

v.

DAVID H. FULTON and WILLIAM B. WYATT,
Respondents.

On Petition for a Writ of Certiorari
To The Supreme Court of Alabama

REPLY BRIEF OF PETITIONER

This reply brief is addressed to the argument in respondents' brief in opposition that as of the date on which the trial court entered summary judgment[1] for petitioner—October 30, 1979—respondents had not had "the benefit of" or "opportunity to pursue" discovery of petitioner.[2]

---

[1] Appendix to Petition, A-14-21.

[2] Respondents make this argument in their Questions Presented and at nine additional places in their brief. (pp. 2, 5, 15, 16, and 19).

This argument of respondents is factually incorrect and considerably misleading. Moreover, the issue of the adequacy of discovery prior to summary judgment formed no part or basis of the decision of the Alabama Supreme Court which petitioner seeks to review here. Indeed, that court never mentioned the matter.

The accurate facts are contained in the order of the trial court of December 6, 1979, which denied reconsideration of its summary judgment. That court there specifically addressed the issue of discovery, and noted that during the almost three month period from August 7, 1979 to the date of summary judgment on October 30, 1979, "[Respondents] made no further attempts to depose [Petitioner]".[3]

Accordingly, the issue of the adequacy of discovery prior to summary judgment is a spurious one based upon a factually erroneous premise. For the reasons specified in the petition for Writ of Certiorari, it is respectfully reiterated that this petition should be granted.

Respectfully submitted,

M. ROLAND NACHMAN, JR.
P. O. Box 668
Montgomery, Alabama 36101
Counsel of Record for
Petitioner

DAVID L. FREEMAN
P. O. Box 10207
Greenville, South Carolina 29603
Counsel for Petitioner

---

[3] The entire text of the trial court's order of December 6, 1979, is appended to this reply brief.

APPENDIX

APPENDIX

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

David H. Fulton,

Plaintiff,

vs.

The Advertiser Company,
et al.,

Defendants.

Civil Action No.
CV-79-731-G

William B. Wyatt,

Plaintiff,

vs.

The Advertiser Company,
et al.,

Defendants.

Civil Action No.
CV-79-729-G

Raiford J. Martin,

Plaintiff,

vs.

David G. Bronner,

Defendant.

Civil Action No.
CV-79-786-G

ORDER

This matter came on to be heard on Plaintiffs Fulton, Martin and Wyatt's motions for reconsideration. Counsel for Plaintiffs

Fulton and Wyatt, and counsel for Defendants appeared. Counsel for Plaintiff Martin did not appear.

The Court having read and considered Plaintiffs' motion for reconsideration, the Court finds that the motion is due to be and it is ORDERED that the same is hereby DENIED.[1]

DONE and ORDERED this the 6th day of December, 1979.

/s/ WILLIAM R. GORDON
Circuit Judge

cc: M. R. Nachman, Esq.
Frank M. Wilson, Esq.
Allen Howell, Esq.

---

[1] On July 27, 1979, the Defendants filed their motion for protective order and for stay of discovery on behalf of Defendants Bronner and The Advertiser Company alleging that depositions had been set and interrogatories filed, but that discovery should be stayed pending decision by the Court regarding a serious question of jurisdiction of this Court to proceed because of the pendency of certain federal court actions filed by the same Plaintiffs. Although no written order was entered, the Court orally informed Plaintiffs' counsel that the motion was well taken and that discovery should be stayed until the Court determined whether these actions could proceed in Circuit Court. On the 7th day of August, 1979, this Court entered its order which held, *inter alia,* that the motion to dismiss filed by Defendants on the grounds of pendency of similar federal action was due to be and the same was denied. Thereafter the Plaintiffs made no further attempts to depose the defendants.

DEC 24 1980

No. 80-830

IN THE
Supreme Court of The United States
October Term, 1980

THE ADVERTISER COMPANY,
Petitioner,

v.

DAVID H. FULTON and WILLIAM B. WYATT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AMICI CURIAE OF THE BIRMINGHAM NEWS COMPANY, THE ALABAMA PRESS ASSOCIATION, and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Of Counsel:
JACK C. LANDAU
SHARON P. MAHONEY
The Reporters Committe For
Freedom of the Press
1125 15th Street, N.W.
Washington, D.C. 20005

JAMES C. BARTON
Johnston, Barton, Proctor,
Swedlaw & Naff
1212 Bank For Savings Building
Birmingham, Alabama 35203
(205) 322-0616

PETER C. GOULD
Sabin, Bermant & Blau
350 Madison Avenue
New York, NY 10017
Counsel for Amici

December 24, 1980

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTION PRESENTED FOR REVIEW

Whether a newspaper defendant is constitutionally entitled to summary judgment in a libel action based upon the defendant's accurate and complete republication or fair abridgement in its next edition, of a State cabinet officer's press release and contemporaneous press conference remarks containing defamatory matter regardless of the defendant's state of mind as to the truth or falsity of the press release and press conference remarks.

CONSENT TO FILING OF AMICUS CURIAE BRIEF

Pursuant to Rule 36, the parties in this matter hereby consent to the filing by The Birmingham News Company, The Alabama Press Association, and The Reporters Committee for Freedom of the Press of a brief as *Amicus Curiae*.

/s/ M. Roland Nachman, Jr.

M. Roland Nachman, Jr.
P.O. Box 668
Montgomery, AL 36101

Counsel of Record for Petitioner

Steiner, Crum & Baker
P.O. Box 668
Montgomery, AL 36101

/s/ Jere L. Beasley

Jere L. Beasley
P.O. Box 4537
Montgomery, AL 36101

Counsel of Record for Respondents

Beasley & Wilson
P.O. Box 4537
Montgomery, AL 36101

TABLE OF CONTENTS

Page

Question Presented for Review ..... (i)

Consent to Filing of *Amicus Curiae* Brief ..... (ii)

Table of Authorities ..... (v)

Opinions Below ..... (vii)

Jurisdiction ..... (vii)

Constitutional Provisions Invoked ..... (vii)

Interest of *Amici* 1

Statement of the Case 3

Reasons for Granting the Writ 5

I. Introduction 5

II. The State of Mind Standard For Press Immunity Under *New York Times v. Sullivan* Lacks The Breadth Necessary And Fails To Protect The Free Flow of Information From Government Press Conferences To The Public When The Ultimate Truth of Such Information, Although Accurately Reported, Is Controverted In A Libel Action 8

A. The state of mind standard for press immunity requires the press to censor ultimate falsehoods from a state cabinet officer's press release and contemporaneous remarks or accurately publish them and risk civil liability 8

B. The state of mind standard for press immunity situationally imposes an inherently unequal immunity as between print media coverage of a state cabinet official's press conference and live press coverage by radio and television of the same, and to that extent fails in its purpose of protecting the state's interest in discouraging defamation 11

C. The state of mind standard for press immunity situationally imposes an inherently unequal immunity between believing and disbelieving members of the print media covering the same press conference 13

III. A Situational Standard For Press Immunity Protecting The Free Flow Of Accurate News From Government Press Conferences To The Public Is Not Derivative Of Or Limited to The Scope Of Executive Immunity; It Is Mandated By The First Amendment 13

IV. Impermissible Fault Standard: Failure To Make An Independent Investigation As To The Truth Or Falsity Of Bronner's Statements 15

V. Appropriate Standard: "The Publication Of Defamatory Matter Concerning Another In A Report Of An Official Action Or Proceeding Or Of A Meeting Open To The Public That Deals With a Matter Of Public Concern Is Privileged If The Report Is Accurate And Complete Or A Fair Abridgement Of The Occurrence Reported." *Restatement (Second) Of Torts* Section 611 17

Conclusion 19

TABLE OF AUTHORITIES

Pages

Barr v. Matteo, 360 U.S. 564 (1959) 13, 14

Browning v. Birmingham News,
348 So.2d 455 (Ala. 1977) 14

Campo Lindo For Dogs, Inc. v. New York Post Corp., 65 A.D.2d 650, 409 N.Y.S.2d 453 (3d Dep't 1978) 6

Cox Broadcasting v. Cohn,
420 U.S. 469 (1975) 9, 10

Dickey v. CBS, Inc.,
583 F.2d 1221 (3d Cir. 1978) 6

Dixson v. Newsweek, Inc.,
562 F.2d 626 (10 Cir. 1977) 6

Edwards v. National Audubon Society, Inc.
556 F.2d 113 (2d Cir.) *cert. den. sub.nom. Edwards v. New York Times Co.*, 434 U.S. 1002 (1977) 6

Garrison v. Louisiana,
379 U.S. 64 (1964) 8

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 15

Gregorie v. Biddle,
177 F.2d 279 (2d Cir. 1949) 13

Krauss v. Champaign News Gazette,
59 Ill. App. 3d 745, 375 N.E.2d 1362 (1978) 6

Landmark Communications v. Virginia,
435 U.S. 829 (1978) 9, 10

Miami Herald v. Tornillo,
418 U.S. 241 (1974) 16

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) ..... 5, *passim*

Oklahoma Publishing Co. v. District Court,
430 U.S. 308 (1977) 12

Orr v. Lynch, 60 A.D.2d 949, 401 N.Y.S.2d 897
(3d Dep't) *aff'd*, 45 N.Y.2d 903, 411 N.Y.S.2d
10, 383 N.E.2d (1978) 6

Rosenbloom v. Metromedia, Inc.,
403 U.S. 29 (1971) 7

Smith v. Daily Mail,
442 U.S. 97 (1979) 10, 12

St. Amant v. Thompson,
390 U.S. 727 (1968) 8, 17

Constitutional Provisions:

Amendment I ..... (vii), *passim*

Amendment XIV ..... (vii), *passim*

Other Authorities:

Restatement (Second) of Torts Section 611 17

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported at 14 Alabama Bar Reporter 2651 and at 388 So. 2d 533 and appears as Appendix A in the Petition for a Writ of Certiorari; the opinion of the trial court, the Circuit Court of Montgomery County, Alabama, of October 30, 1979, appears as Appendix B to said Petition.

JURISDICTION

Amici adopt the grounds of jurisdiction set forth at page 1 of the Petition.

CONSTITUTIONAL PROVISIONS INVOKED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE
Supreme Court of The United States
October Term, 1980

No. 80-830

THE ADVERTISER COMPANY,
Petitioner,

v.

DAVID H. FULTON and WILLIAM B. WYATT,
Respondents.

Brief Amici Curiae of
The Birmingham News Company, The Alabama Press Association, and The Reporters Committee for Freedom of The Press

---

INTEREST OF AMICI

This brief is submitted with the consent of the parties on behalf of The Birmingham News Company, The Alabama Press Association, and The Reporters Committee for Freedom of the Press.

The Birmingham News is the largest daily newspaper in the State of Alabama. It maintains a staff of resident news reporters in Montgomery, Alabama, who cover State government on a daily basis. Finance Director Bronner's press conference was covered by a Birmingham News reporter whose story it published. The essential facts of the press conference published by the petitioner were also published by the Birmingham News. The News was not

sued but has a parallel interest with the petitioner because this litigation arises from routine press coverage of State government.

The Alabama Press Association is the only trade association for newspaper publishers in the State of Alabama. It has a membership of 132 newspaper publishers in the State. Its members have a parallel interest to the Birmingham News and the petitioner, although many of the smaller newspapers do not maintain reporters at the Capitol.

The Reporters Committee for Freedom of the Press is a voluntary unincorporated association of reporters and news editors from the print and broadcast media voted to the protection of the First Amendment and freedom of information interests of the press. It has provided representation, funding, information, legal guidance, and research in virtually every major press freedoms case that has been litigated since 1970.

Amici submit that the decision of the Supreme Court of Alabama interferes with working news reporters and editors who, in most instances, are the link between information and comment from state government on the one hand and the average citizen on the other. Few citizens can attend a press conference. The public depends upon the press to republish governmental press releases and report what occurs at press conferences called by government officials, an obligation the press routinely discharges.

Amici's interest in petitioner's case stems from their necessity to know the risks in discharging this obligation.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth at pages 2-6 of the petition and summarize the facts pertaining to petitioner, the Advertiser, as follows:

David G. Bronner became Finance Director of Alabama in March, 1979. By virtue of this appointment he also became chairman of a committee charged with supervising the personnel and financial affairs of the Alabama Building Commission. One of his earliest undertakings was an investigation into the cause of widepread complaints about mismanagement in the Building Commission.

At the conclusion of the investigation in May, 1979, Mr. Bronner called a press conference which was attended by the Advertiser, and other news organizations. Mr. Bronner distributed a press release that listed four categories of "questionable activities and management" which had been uncovered as a result of his investigation. The press release also stated, "[b]ased upon the information produced by the financial investigation and a thorough review of the qualifications and the past performance of the present Building Commission personnel . . . the Building Commission discharged six employees." In response to a question, Mr. Bronner named the six discharged employees, two of whom are respondents, David H. Fulton and William B. Wyatt.

In its next edition the Advertiser published an article about the press conference. The Advertiser accurately republished the list of abuses released by Mr. Bronner, and accurately named the six discharged employees. It accurately reported that the employees had been discharged following Mr. Bronner's investigation, but did not give the

additional reason for discharge due to "qualifications and past performance."

Respondents sued Mr. Bronner claiming that he had libeled them in statements at the press conference and that the press release was false and defamatory. Respondents also sued the Advertiser for libel for republishing Mr. Bronner's press conference statements and press release.

The trial court granted Mr. Bronner and the Advertiser summary judgment on the grounds that the remarks and the written press release given by Mr. Bronner at the press conference were covered by a qualified executive privilege and that privilege "cloaked the Advertiser as well since it was merely printing the news as it found it."

Respondents Fulton and Wyatt appealed to the Alabama Supreme Court where summary judgment was reversed. The court found that in Alabama a newspaper such as the Advertiser could not fairly and accurately report a press conference without first making an "independent investigation as to the truth or falsity of [the host's] statements." The court also found that the omission of the words "qualifications and past performance" may raise a question about the accuracy of the overall report.

It is from this decision that petition for certiorari is filed.

REASONS FOR GRANTING THE WRIT

I. Introduction

"Attorney General Accuses Justice Department Staff Lawyers of Fraud
Attorney General's Press Conference Produces Allegation That Staff Attorneys Criminally Misused Their Office"

Suppose the Attorney General of the United States calls a press conference which is covered live by television, the wire services and newspapers. During this press conference, he makes a false and defamatory statement accusing several rank and file staff attorneys in the Justice Department of criminally misusing their offices.

What is the liability of a news organization if it promptly and accurately reports the false and defamatory press conference statement, even if the news organization seriously doubts the truth of the allegation? This issue has never been resolved by the Court. It is raised here in a case which involves the prompt reporting by a newspaper, on deadline, of allegedly defamatory statements made by the Alabama State Finance Director at his public press conference announcing the discharge of several rank and file employees of the State Building Commission.

Under *New York Times v. Sullivan,* 376 U.S. 254 (1964), as interpreted by the Alabama Supreme Court, the defamed employees may recover damages if the defendant news organization knew that the press conference allegations were false (a concession *Amici* will make for the purpose of this brief), or published these allegations with reckless disregard of their truth or falsity.

This reading of the *New York Times* rule produces two unacceptable censorship alternatives: either the broadcast and print news organization must suppress the official press conference statement from the public, or the news organization may publish the statement at the risk of being subjected to a libel judgment. Several federal and state courts have dealt with this issue and have reached conflicting results on disparate theories.[1]

As a result, journalists, news organizations and their attorneys have no *stare decisis* or consistent guidelines on which to rely when reporting a public press conference by government officials who make apparently false statements about matters of public interest.

The *Amici,* therefore, ask the Court to assume, for focus upon the question presented, that the press release and remarks of Alabama State Finance Director Bronner were factually false and libeled respondents Fulton and Wyatt. The Court is asked to assume further that petitioner's reporter either had professional doubt as to the factual truth of what was published at the press conference or believed the statements to be false.

So assuming, does the First Amendment protect this petitioner from the dilemma of either accepting the role of government censor or accepting the risk of civil liability for knowingly, but accurately and impartially,

---

[1]See, e.g., *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.) *cert. den. sub. nom. Edwards v. New York Times Co.*, 434 U.S. 1002 (1977); *Dickey v. CBS, Inc.*, 583 F.2d 1221 (3d Cir. 1978); *Dixson v. Newsweek, Inc.*, 562 F.2d 626 (10 Cir. 1977); *Krauss v. Champaign News Gazette*, 59 111. App.3d 745, 375 N.E.2d 1362 (1978); *Orr v. Lynch*, 60 A.D.2d 949, 401 N.Y.S.2d 897 (3d Dep't) *aff'd*, 45N.Y.2d 903, 411 N.Y.S.2d 10, N.E.2d 562 (1978); *Campo Lindo For Dogs, Inc. v. New York Post Corp.*, 65 A.D.2d 650, 409 N.Y.S.2d 453 (3d Dep't 1978).

republishing defamatory matter published during a state cabinet official's press conference?

It should be recognized at the outset that press conferences called by government officials are news events in and of themselves. Government press conferences effectively manipulate the press in the sense that the press attends when called. Their purpose is to trigger the dissemination of information which the host considers newsworthy regardless of whether the press does or not. The point is, that the press should not be looked upon in this posture as "bootstrapping" into newsworthiness the content of government news releases. Thus, this type of situation is distinguished from that of *Rosenbloom v. Metromedia, Inc.*, U.S. 29 (1971), because news releases and comment published at press conferences of government officials are newsworthy whether inferred from either judicial or press standards.

The issue which this case raises is of great importance to the continued ability of the press to function as a conduit of information from government to the public. The present state of legal ambiguity fails to properly safeguard this free expression. Therefore, *Amici* urge that this Court provide its guidance.

II. The State of Mind Standard For Press Immunity Under *New York Times v. Sullivan*[2] Lacks The Breadth Necessary And Fails To Protect The Free Flow Of Information From Government Press Conferences To The Public When The Ultimate Truth Of Such Information, Although Accurately Reported, Is Controverted In A Libel Action.

The consequences of conditioning press liability on belief or disbelief regarding the factual truth of a government press release and contemporaneous remarks of a state cabinet official, as the court below has done, are constitutionally absurd. Three considerations prove this.

A. The state of mind standard for press immunity requires the press to censor ultimate falsehoods from a state cabinet official's press release and contemporaneous remarks or accurately publish them and risk civil liability.

The Supreme Court of Alabama has effectively cast petitioner in the role of government censor upon pain of civil liability. The public has the right to know through the press what government officials say in press conferences,

---

[2]"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not . . ." New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964).

". . . a high degree of awareness of . . . probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

". . . evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

whether it is true or false, defamatory or not. Constitutional protection for the accurate and impartial report of the event is essential. It is worthy of this protection because such reports go to the heart of the public's perception of and responsibility for government. The state of mind protection fails to serve this core constitutional interest.

As stated by this Court in *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975):

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media *to report fully and accurately the proceedings of government*, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. . . . *Id.* at 492. (Emphasis added).

The Court in *Cox* questioned whether the State of Georgia may impose civil sanctions in a right of privacy action for the "accurate publication" of the identity of a rape victim obtained from government records in violation of a state statute. "We are convinced that the State may not do so." *Id.* at 491.

Following *Cox*, this Court in *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), held that the First Amendment did not permit criminal sanctions to be imposed by the State of Virginia for publishing truthful in-

formation regarding confidential proceedings of a state judicial inquiry commission.

In *Smith v. Daily Mail,* 442 U.S. 97 (1979), the Court held that a state cannot, consistent with the First and Fourteenth Amendments, punish the truthful publication of a delinquent juvenile's identity lawfully obtained by a newspaper.

The Court stated:

"Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards. . . ." *Id.* at 102.

Petitioner's information was lawfully obtained. It was accurately reported but allegedly false. *Cox, Landmark,* and *Daily Mail* mandate a rationale that the State of Alabama may not punish its publication unless that punishment furthers an interest more substantial than the public's right to know the identity of the respondent state employees and the stated causes for their discharge. *Cox, Landmark,* and *Daily Mail* protect the press from civil or criminal sanctions imposed by a state for publishing accurate government information.

Amici recognize that these three cases did not involve a controversy that the published information was false; consequently they do not reach the question urged in this petition. They do instill the rationale however, that a state may not protect the reputational interests of its discharged employees, through civil actions for punitive damages which aim to discipline the press to either censor falsehoods from a state official's press statements or effectively insure their truth by risking civil liability for their falsity.

B. The state of mind standard for press immunity situationally imposes an inherently unequal immunity as between print media coverage of a state cabinet official's press conference and live press coverage by radio and television and to that extent fails in its purpose of protecting the state's interest in discouraging defamation.

The state of mind standard intrinsically contemplates an editorial perception of truth or falsity before publication of information in the print media. It requires a dutiful editorial process that deliberately includes or excludes, accepts or rejects. This duty is the touchstone of the conditional privilege against liability for defamation whether that duty is breached allegedly by willfulness or simple negligence.

Time to perceive is required to discharge this duty; indeed for the standard to be meaningful there must be sufficient time between receipt and publication of news for some editorial deliberation.

Live press coverage by television and radio permits no time to edit. Therefore, live broadcasting of a government press conference must either enjoy an absolute situational immunity or incur common law strict liability for broadcasting a government official's defamatory statements verbatim.

The electronic media's state of mind in this context is functionally irrelevant since the opportunity to edit is mechanically precluded by the state of the art.

Consequently the print media and the electronic media will be judged under different standards for doing the same thing, that is, covering the same government official's press conference.

In *Smith v. Daily Mail, supra,* Mr. Justice Rehnquist in his concurring opinion stated:

> The West Virginia statute prohibits only newspapers from printing the names of youths charged in juvenile proceedings. Electronic media and other forms of publications can announce the young person's name with impunity. In fact, in this case three radio stations broadcast the alleged assailant's name before it was published by *The Charleston Daily Mail. . . . This statute largely fails to achieve its purpose.* It is difficult to take every seriously West Virginia's assertive need to preserve the anonymity of its youthful offenders when it permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment.[2] (emphasis added)

Mr. Justice Rehnquist, in footnote 3 added:

> I believe that an obvious failure of a state statute to achieve its purpose is entitled to considerable weight in the balancing process that is employed in deciding issues arising under the First and Fourteenth Amendment protections accorded freedom of expression. . . . *Id.* at 110.

The petition should be granted upon this rationale. The standard imposed by the court below should be replaced with a situational immunity for all media that equally protects both.

---

[3] *See also,* Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (*per curiam*) (First And Fourteenth Amendments will not permit a state court to prohibit the publication of information obtained at open court proceedings, when that information had already been widely disseminated).

C. The state of mind standard for press immunity situationally imposed an inherently unequal immunity between believing and disbelieving members of the print media covering the same press conference.

A true believer among the attendant press who discharges his newsgathering duties in a smorgasbord fashion, accepting as truthful, the content of a press release placed before him by a state cabinet official, enjoys a constitutional immunity from liability for republishing the falsehoods disseminated at the press conference.

A working reporter who covers same press conference but, through his diligence, has information casting doubt on its truthfulness does not enjoy the same immunity. Under the decision below the latter may not meet the same deadline as his counterpart unless he and his publisher assume the risk of liability or censor to a barren report that "six unnamed employees of the State Building Commission were discharged for cause following a state investigation. . . ."

III. A Situational Standard For Press Immunity Protecting The Free Flow Of Accurate News From Government Press Conferences To The Public Is Not Derivative Of Or Limited To The Scope Of Executive Immunity; It Is Mandated By The First Amendment.

In *Barr v. Matteo,* 360 U.S. 564 (1959), this Court sustained an absolute immunity for a federal official sued for defamation based upon his press release made in the exercise of his official responsibilities.

After quoting Judge Learned Hand in *Gregorie v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949), who "admirably expressed" the reasons for the recognition of the privilege,

this Court said: ". . . The privilege is not a badge or emolument of exalted office, but an expression of a policy to aid in the effective functioning of government. . . ." *Barr,* at 571.

The court below expressly rejected the absolute *Barr* v. *Matteo* executive immunity in *Browning v. Birmingham News,* 348 So.2d 455, (Ala. 1977), in favor of a more limited conditional privilege *to which it confines petitioner in the opinion below.*

"As to defendant Advertiser, we find as did the trial judge, that the Advertiser was protected by Bronner's conditional privilege to the extent that it reported fairly and accurately the information released at the press conference." A 12-13 (emphasis added).

Thus petitioner's conditional privilege was held derivative merely of the privilege possessed by Bronner and limited to its scope defined in *Browning, supra,* to the exclusion of the independent mandates of the First Amendment.

Executive immunity, absolute or conditional, protects the effective functioning of government; it is not designed to protect the press. Under the First Amendment press freedoms are not limited to or dependent upon executive immunity. Indeed the existence of executive immunity was cited in *New York Times v. Sullivan, supra,* 376 U.S. at 283, to justify an independent ". . . fair equivalent of the immunity granted to the officials themselves."

The *New York Times v. Sullivan* conditional privilege was thereby justified as a "fair equivalent" of absolute *Barr v. Matteo* executive immunity. In Alabama the *New York Times v. Sullivan* conditional privilege will be equated to Bronner's if left in the custody of the court below.

One prospect of the lower court's error: If Bronner acted unlawfully outside the "penumbra of his official duties" (which suggests hotter newsworthiness) he enjoys no privilege. If petitioner's privilege is solely derivative of Bronner's and Bronner has none, we are back to square one of common law liability in Alabama.

Derivative immunity, dependent upon an incumbent office holder's scope of responsibility, bifurcates and favors one side of a controversy. A libelee's retaliatory remarks, denials or explanations must be situationally protected also to protect the contemplated and competitive robust debate which choice over censorship we have inherited along with the notion that debate produces the closest we will come to the truth. The lower court's error hurts rather than helps this process.

IV. Impermissible Fault Standard: Failure To Make An Independent Investigation As To The Truth Or Falsity Of Bronner's Statements.

This Court is *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), invited the states to fashion appropriate fault standards to protect the reputation of private individuals. The court below accepted this invitation by insinuating a mandatory constraint upon petitioner to make an "independent investigation" as to the truth or falsity of Bronner's statements, presumably before reporting news regarding the discharged for cause of six state employees.

For this constraint to be constitutional, it must be based in turn on petitioner's constitutional right of access to criminal investigative files of the State of Alabama. There is no such right. Without the right of access petitioner's investigation is stymied at the outset.

Assuming petitioner's access, the constraint to investigative transforms petitioner into either Bronner's role as investigator-prosecutor or the respondent's advocate rather than reporter.

Consequently, the constraint independently to investigate erroneously presumes the right of access and editorial resources to be cast in an involuntary role. It also ignores the fact that news has the shortest shelf life of any product known to the industrial revolution.

The only possible purpose a mandated pre-publication "independent" investigation requirement could serve is to reflect editorially its results. Its design must be to verify, dispute or neutralize the defamatory innuendos inferrable from the press release. Even if verified it would reflect, however, the petitioner's judgmental findings that concur in whole or in part with the government's.

If petitioner's findings dispute or neutralize the government's, the requirement erroneously presumes that the respondents will issue to petitioner their denials or explanations in preference to filing suit. Whatever the results, it requires petitioner to make news rather than report news.

The urgency of this Court's timely scrutiny of this constraint must not be overlooked. As the final arbitor of First Amendment freedoms this Court should scrutinize even the vaguest judicial notions that if left to germinate, can grow into substantial restraints upon the press. What may be planted here is a state-imposed fairness doctrine that is equally beguiling but not more permissible than the facially fair Florida right or reply statute condemned in *Miami Herald v. Tornillo,* 418 U.S. 241 (1974): "Government restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. . . ." *Id.* at 246.

Under *St. Amant v. Thompson, supra,* the failure to investigate was appropriately held to be irrelevant.

V. Appropriate Standard: "The Publication of Defamatory Matter Concerning Another in a Report of an Official Action or Proceeding or of a Meeting Open to the Public That Deals With a Matter of Public Concern is Privileged if the Report is Accurate and Complete or a Fair Abridgement of the Occurrence Reported."[3]

Instead of the standards imposed by the court below, *Amici* urge that this Court reverse and adopt as a mandate of the First Amendment the privilege delineated in the *Restatement.*

This privilege is conditioned upon the report being: ". . . accurate and complete or a fair abridgement of the occurrence reported." "Abridgement" as used in Section 611 means a summary of the verbatim which communicates its major point. "Fair" qualifies abridgement in the sense that no major point is distorted or omitted, the occurrence or concurrence of which permits a defamatory innuendo that is not permitted by the verbatim.

"Fair" does not mean that the reporter must apply to the verbatim his independent judgment as to truth of falsity, credibility or incredibility of the verbatim; in so doing the reporter would be editorializing rather than reporting. "Fair" does not mean a mandated access as in "fairness doctrine".

The objective standard urged by *Amici* invites and cautions the press to be impartial and neutral in reporting defamatory matter originating in public proceedings. In-

[3] *Restatement (Second) of Torts* Section 611.

deed, the reporter who visits his subjective judgment as to truth or falsity, credibility or incredibility upon the verbatim to the extent that a major point is distorted or omitted risks judicial scrutiny that the abridgement is not fair and consequently not privileged.

Here lies the constitutionally permissible and necessary fault standard; the fault being the failure to do what is reasonably necessary to insure that the report is "accurate and complete or a fair abridgement", and specifically with reference to the alternative "fair abridgement", does not distort or omit a major point, the occurence or concurrence of which permits a defamatory innuendo not permitted by the verbatim.

Petitioner's omission to quote Bronner's shorthand characterization that respondents were discharged ". . . because of qualifications and performance . . ." (A-13) does not meet this test. This omission is the scintilla of the lower court's focus. Bronner's shorthand characterization was not a major point; it was a descriptive convenience; it did not qualify the other major points to the extent that its omission permits the defamatory innuendo that the respondents were discharged for other than one or more of the four specific causes accurately republished by petitioner. Alternatively stated: its inclusion would not exonerate respondents from the defamatory innuendos of anyone of the four specific and accurately republished causes for discharge in the verbatim.

To otherwise conclude would impose the impermissible classical consequences of common law pleading upon the press report; strictures from which the adoption of code pleading generally relieved the bench and bar. A fault standard imposed by courts upon the press for publishing alleged false and defamatory matter must provide the breathing space to report a cabinet official's press con-

ference with no more specificity than is required of the respondents to state their complaint.

Moreover, it is a credible thesis that the press must have relatively more breathing space in reporting deadline news.

CONCLUSION

Amici respectfully urge the Court to enter an order granting the petition in order that the substantial constitutional questions raised by petitioner and *Amici* can be fully examined, and urge further that the judgment below be reversed and rendered.

Respectfully submitted,

JAMES C. BARTON
Johnston, Barton, Proctor,
Swedlaw & Naff
1212 Bank For Savings Building
Birmingham, Alabama 35203

PETER C. GOULD
Sabin, Bermant & Blau
350 Madison Avenue
New York, NY 10017
Counsel for Amici

Of Counsel:
JACK C. LANDAU
SHARON P. MAHONEY
The Reporters Committe For
Freedom of the Press
1125 15th Street, N.W.
Washington, D.C. 20005

NO. 80-830

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE ADVERTISER COMPANY

Petitioner,

v.

DAVID H. FULTON and WILLIAM B. WYATT,

Respondents.

MOTION FOR LEAVE TO FILE AND AMICUS BRIEF OF SOUTH CAROLINA PRESS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

SAMUEL H. CARTER, ESQ.
South Carolina Press Association
P. O. Box 11205
Columbia, South Carolina 29211

Phone: (803) 254-0013

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

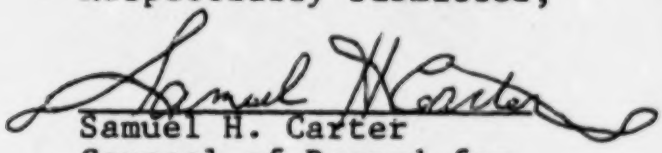
The South Carolina Press Association respectfully moves for leave to file the attached Brief amicus curiae. The attorney for respondent has refused to consent. The consent of attorney for the petitioner has been obtained.

The Association is a trade association with a voluntary membership consisting of all the daily newspapers and a substantial majority of the weekly newspapers in South Carolina. The possibility that the ruling below may be followed in South Carolina in similar cases makes this case important to this Association.

The Association has reviewed the Petition and Brief already filed with the Court and would like to point out significant additional arguments. The Association's Brief demonstrates (1) that the

decision below applies a standard for summary judgment that is in conflict with the decision of numerous State courts, and (2) that the decision below embodies an interpretation of a prior decision of this Court which conflicts with the interpretation of other State courts.

Respectfully submitted,



Samuel H. Carter
Counsel of Record for
South Carolina Press
Association

NO. 80-830

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE ADVERTISER COMPANY

Petitioner,

v

DAVID H. FULTON and WILLIAM B. WYATT,

Respondents.

AMICUS BRIEF OF SOUTH CAROLINA PRESS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

SAMUEL H. CARTER, ESQ.
South Carolina Press Association
P.O. Box 11205
Columbia, South Carolina 29211

Phone: 803/254-0013

QUESTION PRESENTED FOR REVIEW

Whether the First and Fourteenth Amendments permit a court to deny summary judgment in favor of a newspaper in a libel suit brought by a public official, when there is no clear and convincing evidence of actual malice?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	7
I. The disposition of summary judgment motions in libel suits by public figures involves the First Amendment	7
II. The Alabama Court's interpretaion of New York Times conflicts with that followed by numerous other state courts and federal courts	10
III. The Alabama Supreme Court's interpretation of footnote 9 in Hutchinson v. Proxmire, ___ U.S. ___, 99 S.Ct. 2675 (1979), conflicts with that of the courts of Massachusetts and the District of Columbia	13
CONCLUSION	18
APPENDIX A (A copy of alleged libelous article as stated in the Complaint)	A-1
APPENDIX B (A copy of press release)	A-4

TABLE OF AUTHORITIES

	Page
American Benefit Life Ins. Co. v. McIntyre, 375 So.2d 239 (Ala. 1979)	6, 14, 15
Bandelin v. Pietsch, 563 P.2d 395 (Idaho 1977)	10, 11
Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (CA 5 1970)	9, 12
Carson v. Allied News Co., 529 F.2d 206 (CA 7 1976)	9
Chase v. Daily Record, Inc., 515 P.2d 154 (Wash. 1973)	10, 12
Curran v. Philadelphia Newspapers, Inc., 395 A.2d 1342 (Pa. 1978)	10, 12
DiLeo v. Koltnow, 613 P.2d 318 (Col. 1980)	9, 11
Fadell v. Minneapolis Star and Tribune Co., 557 F.2d 107 (CA 7 1977)	9, 12
Good Government of Seal Beach, Inc. v. Superior Court, 586 P.2d 572 (Cal. 1978)	9, 11
Guam Federation of Teachers Local 1581 v. Ysrael, 492 F.2d 438 (CA 9 1974)	9, 12
Hutchinson v. Proxmire, U.S. ____, 99 S.Ct. 2675 (1979)	13
Hutchinson v. Proxmire, 431 F.Supp. 1311 (W.D. Wis. 1977)	14

TABLE OF AUTHORITIES

	Page
Kidder v. Anderson, 354 So.2d 1306 (La. 1978)	10, 12
Loveless v. Graddick, 325 So.2d 137 (1975)	.6
MacGuire v. Harriscope Broadcasting Co., 612 P.2d 830 (Wyo. 1980)	10, 12
Manuel v. Fort Collins Newspapers, Inc., 599 P.2d 931 (Col. Ct. App. 1979)	10
Nader v. de Toledano, 408 A.2d 31 (D.C. 1979)	10, 11, 13, 16
National Ass'n of Govt. Employees v. Central Broadcasting Corp., 396 N.E.2d 996 (Mass. 1979)	10, 12, 16
New York Times v. Sullivan, 376 U.S. 254 (1964)	passim
Oliver v. Village Voice, Inc., 417 F.Supp. 235 (S.D.N.Y. 1976)	.9, 12
Time, Inc. v. McLaney, 406 F.2d 565 (CA 5 1969)	.9, 12
Washington Post Company v. Keogh, 365 F.2d 965 (D.C. Cir. 1966)	.8, 12
Wigmore on Evidence	17

STATEMENT OF THE CASE[1]

Respondents, Wyatt, a former Deputy Director of the State Building Commission of Alabama, and Fulton, a former Building Inspector for the Commission, brought libel actions against Petitioner, The Advertiser Company. The libel claims arose from an article entitled "Officials Fired Following Probe." The article[2] stated that the respondents and other employees of the State Building Commission had been fired following "an investigation into mishandling of building contracts and state work on private property", which uncovered "widespread abuses." Pet. App. at A-4. According to the article, Bronner, Director of Finance

---

1 "Pet. App." in this Brief refers to the appendix to the petition of the Advertiser. "Pet." refers to the petition of the Advertiser. "App." refers to the appendix to this Brief.

2 The allegedly libelous portions of the article as quoted in the complaint are attached to this Brief as Appendix A.

for the State of Alabama, had disclosed that the investigation had uncovered evidence of questionable activities and management in four areas. Bronner, the article reported, said that one of the employees fired was a building inspector who had not turned in an inspection report in seven years and that the results of the investigation would be turned over to the State Attorney General. The article also reported other statements by Bronner pertaining to the investigation and the firing of the employees.

The information in the article was obtained at a press conference where Bronner issued a press release. The release stated that evidence had been received relating to four types of questionable activities. It also stated that six employees had been discharged as a result of the information gathered and a review of the qualifications and performance of Building Commission personnel. App. at A-4.

At the press conference Bronner also stated that respondents were among the employees discharged. Bronner stated further that no charges had been made against the discharged employees and that they had been discharged because of their qualifications and performance. Pet. App. at A-28.

After the respondents filed suit, The Advertiser moved to dismiss on the ground, among others, that respondents were public officials and the alleged libelous article had been published without actual malice on the part of The Advertiser. In support of the motion, the press release[3] as well as affidavits from Bronner and others were submitted. The motion was converted into a motion for summary judgment. The Advertiser contended that summary judgment in its favor

---

[3] A copy of the press release was attached to the affidavit of Bronner as Exhibit C and is reproduced for the Court in Appendix B to this Brief.

was essential, in accord with New York Times v. Sullivan, 376 U.S. 254 (1964), to protect its right of freedom of the press guaranteed by the First and Fourth Amendments.

In opposition, respondents submitted their own affidavits challenging the truth of the press release and Bronner's statements. Respondents failed, however, to offer any evidence that The Advertiser had published the article with knowledge that it was false or with reckless disregard of whether it was false or not.

The Alabama Circuit Court granted The Advertiser's motion for summary judgment. The court held that Bronner's statements about the respondents were protected by a qualified executive privilege under Alabama law. It held further that The Advertiser was protected by the same privilege because its "account of the [press] conference was fair" and "the paper was merely printing the news as it found it." Pet. App. at A-21.

When the respondents appealed to the Alabama Supreme Court, The Advertiser argued again that summary judgment in its favor was required to protect its First and Fourteenth Amendment rights of freedom of the press, and relied upon New York Times and its progeny. The Supreme Court of Alabama, however, rejected the newspaper's arguments. The court concluded that summary judgment was not appropriate because (1) the record indicated that the newspaper had failed to report specifically that one stated reason for respondents' discharge was their "qualifications and performance"; and (2) that there was no evidence that the newspaper had made an independent investigation regarding the truth of the statements made by Director of Finance Bronner. Those two aspects of the record, in the opinion of the Alabama Supreme Court, created a material issue of fact requiring a full trial on the libel issue.

The Alabama Court based its denial of summary judgment in favor of The Advertiser primarily on two of its earlier decisions, American Benefit Life Ins. Co. v. McIntyre, 375 So.2d 239 (1979) and Loveless v. Graddick, 325 So.2d 137 (1975). In American Benefit, the Alabama Court held that

> neither New York Times v. Sullivan nor Mobile Press Register, Inc. v. Faulkner [(an opinion of the Alabama Court)] requires the application of a clear and convincing evidence test on a motion for summary judgment

id. at 249, and declared that the Alabama "Scintilla Rule" rather than the New York Times "clear and convincing evidence" test applied to motion for summary judgment in libel suits by public figures. In Loveless the court concluded that the "Scintilla Rule" requires denial of summary judgment "if there is a scintilla of evidence in the plaintiff's favor" and that summary judgment is "peculiarly inappropriate" on the issue of malice in libel suits.

REASONS FOR GRANTING THE WRIT

Amicus believes that there are at least three additional reasons why the Court should resolve the questions raised by the Alabama Supreme Court's refusal to adhere to the "clear and convincing evidence" test at the summary judgment stage of libel suits by public officials.

I.

The disposition of summary judgment motions in libel suits by public figures involves the First Amendment.

The availability of summary procedures in libel suits by public officials is essential to honor the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Company v. Sullivan, 376 U.S. 254, 270 (1964). Unless critics of

public officials are effectively shielded from the expense and harassment of meritless libel suits, the protections offered by New York Times may be of little value. The following quotation from Washington Post Company v. Keogh, 365 F.2d 965, 968 (CA D.C. 1966) shows clearly the need for vindication of First Amendment rights at the summary judgment stage:

> In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the Times principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits.

> Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured of freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent, debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide open.

A host of federal and state decisions have acknowledged the importance of applying the standards of New York Times at the summary judgment stage in order to protect First Amendment freedoms.[4]

---

[4] See e.g. Fadell v. Minneapolis Star and Tribune Co., 557 F.2d 107 (CA 7 1977); Carson v. Allied News Co., 529 F.2d 206, 210 (CA 7 1976); Guam Federation of Teachers Local 1581 v. Ysrael, 492 F.2d 438, 441 (CA 9 1974); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 864-67 (CA 5 1970) ("actual malice is a constitutional issue to be determined initially by the trial judge on any motion for summary judgment); Time, Inc. v. McLaney, 406 F.2d 565, 566, 572-73 (CA 5 1969); Oliver v. Village Voice, Inc., 417 F.Supp. 235, 237 (S.D.N.Y. 1976); Good Government of Seal Beach, Inc. v. Superior Court, 586 P.2d 572, 578 (Cal. 1978); DiLeo v. Koltnow, 613 P.2d 318, 323 (Col. 1980) (en banc) ("were not summary judgment granted in proper cases, the threat of protracted litigation might have a chilling effect

II.

The Alabama Court's interpretation of New York Times conflicts with that followed by numerous other state courts and federal courts.

The record in this case contains no clear and convincing evidence of malice as defined by New York Times. Nevertheless,

---

4 (Cont'd) upon the full and free exercise of the First Amendment rights. . . protected by New York Times); Manuel v. Fort Collins Newspapers, Inc., 599 P.2d 931, 933-34 (Col. Ct. App. 1979); Nader v. de Toledano, 408 A.2d 31, 43-44 (D.C. 1979); Bandelin v. Pietsch, 563 P.2d 395, 399 (Idaho 1977) ("first amendment is not without protection in summary judgment proceedings"); Kidder v. Anderson, 354 So.2d 1306, 1310 (La. 1978) ("In cases affecting the exercise of First Amendment liberties, proper summary judgment procedure is essential"); National Ass'n of Govt. Employees v. Central Broadcasting Corp., 396 N.E.2d 996, 1003-04 (Mass. 1979); Curran v. Philadelphia Newspapers, Inc., 395 A.2d 1342, 1346-48 (Pa. 1978) (opinion for equally divided court); Chase v. Daily Record, Inc., 515 P.2d 154, 158 & n.3 (Wash. 1973) (en banc); MacGuire v. Harriscope Broadcasting Co., 612 P.2d 830, 831-32 (Wyo. 1980) (summary judgment is "the most appropriate remedy in order to minimize the chilling effect of litigation").

the Alabama court has concluded that New York Times does not require the application of the "clear and convincing evidence test" on motion for summary judgment.

In direct conflict with the Alabama Court's interpretation of New York Times, many other state courts have concluded that a proper application of New York Times requires that summary judgment be granted when there is no evidence of malice in the New York Times sense.[5] Many federal courts have also concluded that New York Times

---

[5] See, e.g., Good Government Group of Seal Beach, Inc. v. Superior Court, 586 P.2d 572, 578 (Cal. 1978); DiLeo v. Koltnow, 613 P.2d 318, 323 (Col. 1980) (en banc) (plaintiff had "not successfully shown by convincing clarity that the defendants published the article with actual malice, and accordingly, summary judgment was properly granted"); Nader v. de Toledano, 408 A.2d 31, 50 (D.C. 1979) ("the question to be resolved at summary judgment is whether plaintiff's proof is sufficient such that a reasonable jury could find malice with convincing clarity"); Bandelin v. Pietsch, 563 P.2d 395, 399 (Idaho 1977) ("Unless there is evidence which if believed by a jury would establish malice clearly and convincingly, a defendant is

requires the application of the clear and convincing evidence test on motions for summary judgment.[6]

---

5 (Cont'd) entitled to summary judgment"); Kidder v. Anderson, 354 So.2d 1306, 1310 (La. 1978) ("in order for plaintiff to be successful on the threshold issue of summary judgment, he must come forth with strong evidence, convincing clear evidence, that defendant either [sic] know the statements published were false or that he had reckless disregard of whether they were false or not."); National Ass'n of Govt. Employees v. Central Broadcasting Corp., 396 N.E.2d 996, 1002 (Mass. 1979); Curran v. Philadelphia Newspapers, Inc., 395 A.2d 1342, 1348 (Pa. 1978) (opinion of equally divided court) ("Unless the court finds . . . that the plaintiff can prove actual malice in New York Times sense, it should grant summary judgment for the defendant"); Chase v. Daily Record, Inc., 515 P.2d 154, 158 n.3 (Wash. 1973) (en banc) ("we think that simply requiring a degree or a standard of 'convincing clarity' in itself imposes the required level or quantum of proof"); MacGuire v. Harriscope Broadcasting Co., 612 P.2d 830, 832 (Wyo. 1980).

6 See, e.g., Fadell v. Minneapolis Star and Tribune Co., Inc., supra, at 108; Guam Federation of Teachers Local 1581 v. Ysreal, supra, at 441; Bon Air Hotel, Inc. v. Time, Inc., supra, at 864-65; Time, Inc. v. McLaney, supra, at 573; Washington Post Company v. Keogh, supra, at 972; Oliver v. Village Voice, Inc., supra, at 237.

The Court should act quickly to resolve the conflict regarding the proper application of New York Times to summary judgment motions. As long as it remains uncorrected, the Alabama court's ruling chills the free exercise of First Amendment freedoms.

Moreover, there is considerable confusion among the courts that apply the "clear and convincing evidence test" as to exactly how it should be applied. See Nader v. de Toledano, 408 A.2d 31 (D.C. 1979). That confusion, as well, should be dispelled.

III.

The Alabama Supreme Court's interpretation of footnote 9 in Hutchinson v. Proxmire, U.S. , 99 S.Ct. 2675, (1979), conflicts with that of the courts of Massachusetts and the District of Columbia.

The confusion about the application of New York Times to motions for summary judgment arises in part from uncertainty as to the meaning of footnote 9 in Hutchinson v.

Proxmire, supra. In Proxmire, the District Court suggested that, in determining whether there had been an adequate showing of actual malice, "'summary judgment may well be the "rule" rather than the "exception".'" Id. 431 F.Supp. 1311, 1330 (W.D. Wis. 1977). This Court's opinion in Proxmire did not address the summary judgment issue. The District Court's suggestion regarding summary judgment, however, provoked the following dictum in footnote 9 of the Court's opinion:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, New York Times v. Sullivan . . . and does not readily lend itself to summary disposition. [Citations omitted]. In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.

The Alabama Supreme Court misinterpreted the dictum of footnote 9 as a holding. See American Benefit Life Ins. Co.

v. McIntyre, supra at 249. Moreover, the Alabama Court went so far as to suggest that Proxmire rendered the States free to apply their own standards to summary judgment motions even though the ultimate verdict might be governed by the standards set forth in New York Times. The Alabama Court stated:

> The burden on a movant in a summary judgment case involving libel continues to be grounded upon state law. Hutchinson v. Proxmire . . . .

On the basis of footnote 9 in Proxmire, the Alabama Supreme Court rejected the "clear and convincing evidence" test as a standard for summary judgment and adopted instead its own scintilla rule - a rule which in the case at hand prevented summary judgment for the newspaper even though the plaintiffs have no chance of prevailing under the standards of New York Times.

Amicus contends the proper interpretation of footnote 9 is reflected in the

opinion of the Massachusetts Supreme Judicial Court in National Ass'n of Govt. Employees, Inc. v. Central Broadcasting Corporation, supra at 1003. In reversing a denial of summary judgment in National Ass'n, the Massachusetts court acknowledged footnote 9 in Proxmire. Nevertheless, the Massachusetts court declared that Proxmire did not mean that a plaintiff could survive summary judgment without producing "the requisite quantum of evidence to enable him to reach the jury with his claim." Likewise, the District of Columbia Court of Appeals in Nader v. deToledano, supra at 44, recognized that summary judgment remains "a useful method of disposing of constitutional libel actions -- where appropriate," even though footnote 9 in Proxmire had sounded "a note of caution in this area." And the court went on to declare that

> The question to be resolved at summary judgment is whether plaintiff's proof is sufficient such

> that a reasonable jury could find malice with convincing clarity.

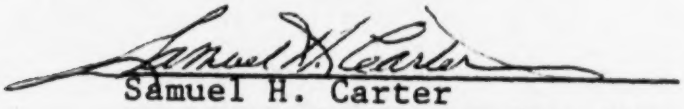
Id at 50.

Footnote 9, as interpreted by the Alabama Supreme Court, signals a retreat from the principles of New York Times in the context of summary judgment. As interpreted by the courts of Massachusetts and the District of Columbia, footnote 9 is only a note of caution against an excessively liberal use of summary judgment. The confusion that has arisen regarding the meaning of footnote 9 threatens to chill the exercise of First Amendment freedoms. In South Carolina where the "scintilla rule" is still invoked, at least in name, see IX Wigmore on Evidence § 2494 n.12 (1980 Pocket Supplement), the confusion is especially chilling because of the possibility that the Alabama rule may be followed.

CONCLUSION

Amicus begs the Court to resolve the conflict regarding the proper standards to be applied to summary judgment motions in libel suits brought by public officials and regarding the meaning of footnote 9 in the Proxmire opinion. The uncertainty about these questions threatens the exercise of rights vital to the proper functioning of the government. If the Alabama Court's position on these questions is not corrected, other courts that have not addressed them, like the Supreme Court of South Carolina, may follow the lead of the Alabama Court. Delay in the resolution of the issues may be detrimental to the freedom of expression in South Carolina and other States as well.

Respectfully submitted,



Samuel H. Carter
Attorney for South Carolina
Press Association Amicus.

APPENDIX A

The director, deputy director and four other employees of the State Building Commission were fired Tuesday in the wake of an investigation into mishandling of building contracts and state work on private property.

Finance Director David Bronner said Building Commission Director Hugh Adams, Deputy Director William Wyatt, Energy Division Chief John Cluck and three building inspectors were fired by the Commission's executive committee after the investigation uncovered widespread abuses in the department.

Bronner directed the six-week investigation by members of the Examiners of Public Accounts, the Department of Public Safety, and the Finance Department.

The results were turned over to Attorney General Charlie Graddick for further investigation.

W. G. Stevenson, a professional engineer and veteran employee of the Commission, was appointed temporary director of the department. Other vacancies will be filled later, but Bronner said some of the vacancies will probably remain unfilled.

The finance director said one of the fired building inspectors had not turned in an inspection report in seven years.

The dismissed inspectors were identified as David Fulton, Ray Martin and Howard Wilson.

Bronner said the investigation uncovered evidence of questionable activities and management in four areas:

--The use of State employees on State time to do private business.

--The discovery of employees on the payroll who provided little or no service to the State.

--Allowing or initiating construction change orders resulting in contractors receiving greater profits.

--The use of gratuities and agents in order to secure State business.

Contractors and architects wanting to do business with the State were told they would have to get an agent with political influence before they could get a State contract, Bronner said. The contractor or architect negotiated with the agent to use his influence, the finance director added.

But contractors and architects who used agents in the past would not be barred from doing business with the State, he said.

"This is more a problem of the State than of the architects and contractors," he said. "They had to go through the system, and the system was bad."

Bronner said in reply to questions that none of the private work involved the new home of former Gov. George Wallace or property of his relatives.

The finance director declined to answer when asked if the private work involved property belonging to any of the dismissed employees.

Change orders were freely given with the result that contractors could bid low on a project and then add unbid modifications to increase the price to a more profitable level, he said.

The investigators examined commission activities over a five or six-year period during which contracts involving millions of dollars in school and other building construction were issued.

The firings did not have to go through the state personnel system because the employees were appointed by the Building Commission outside the merit system, Bronner said.

The Commission's executive council is composed of Bronner, State Superintendent of Education Wayne Teague and State Rep. James Sasser of Ozark.

Adams had been Commission Director since 1964 and had been with the Commission staff since 1959.

Wyatt was appointed to the Commission staff as Deputy Director in 1971.

Cluck joined the Commission staff in December 1977 as chief building energy engineer.

Bronner said the dismissed employees were not given a chance to resign because they knew for at least two weeks they were being investigated and had not resigned.

PRESS CONFERENCE
May 29, 1979
2:00 P.M.

A financial investigation authorized by Title 41 of the Code of Alabama has been conducted into the Alabama Building Commission.

The investigation was conducted by the Examiners of Public Account, the Department of Public Safety and the Finance Office, which included taking sworn deposition from employees of the Building Commission, architects, contractors and testing firms from throughout Alabama.

As a result of this financial investigation, evidence of questionable activities and management was received relating to the following:

(1) The utilization of State employees on State time to do private business.

(2) The discovery of employees on the payroll who provided little or no service to the State.

(3) Allowing and/or initiating construction change orders resulting in contractors receiving greater profits.

(4) The utilization of gratuities and/or agents in order to secure state business.

Based on the information produced by the financial investigation and a thorough review of the qualifications and past performance of the present Building Commission

personnel, the "Personnel and Finance Committee" of the Building Commission discharged six employees.

All results of the investigation will be turned over to the Attorney General to be utilized as he sees fit.

see 80

831